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In The SUPREME COURT Of The UNITED STATES

October Term 1967

No. 548

SNOHOMISH COUNTY,
A Municipal Corporation,

Appellant,

V.

SEATTLE DISPOSAL COMPANY
and THE TULALIP TRIBES,
A Federal Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Washington

JOHN WILSON
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Everett, Washington

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To the Supreme Court of the State of Washington

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

The County of Snohomish, in the State of Washington, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Washington State Supreme Court in the above entitled case.

REFERENCES TO THE RECORD

The Washington State Supreme Court will forward to this Honorable Court a certified copy of its record, references to which are made herein as follows:

Portion of Record Cited	Abbreviation Used
Brief of Appellant	(R,BA, ——)
Statement of Facts	(R. SF. ——)

OPINIONS BELOW

The memorandum opinion of the Snohomish County Superior Court is unreported but appended hereto in Appendix A, *infra*, pp. A-1, A-3. The said opinion of the Washington State Supreme Court is reported in 71 Wn. Dec. 2d-425 P. 2d 22 (1967) and appended hereto in Appendix A, *infra*, pp. A-4, A-17.

On April 7, 1967 the petitioner herein filed a petition for rehearing to the Supreme Court of the State of Washington. On June 2, 1967 the Court denied the petition by order which is unreported but appended hereto in Appendix A, *infra*, pp. A-17. The remittitur was issued on June 5, 1967, which is appended in Appendix A, *infra*, pp. A-18.

JURISDICTION

This petition is within 28 USC §1257(3) which *inter alia* provides that the final judgments rendered by the highest court of a state may be reviewed by the United States Supreme Court by writ of certiorari ". . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

This petition has been filed within ninety (90) days of final judgment of the Washington State Supreme Court as prescribed by Rule 21, SUREME COURT RULES. It presents substantial federal questions within the purview of 28 USC §1257(3), *supra*, as delineated herein under "Questions Presented," which were raised in the Superior Court in the first instance and then in the State Supreme Court as set forth under subheading "3", "Stages at Which Federal Questions Were Raised," in the "Statement" section, *infra*.

QUESTIONS PRESENTED

1. WHETHER THE PURCHASE IN 1963 BY THE TULALIP TRIBES OF ALLOTMENT 92 IN FEE REIMPOSED A RESTRICTION ON ALIENATION BY 25 USC § 403a, October 9, 1940, 59 Stat. 1057 AND BY 25 USC §403a-2, June 18, 1956, 70 Stat. 290, or WHERE SAID PURCHASE WAS MADE PURSUANT TO A JUDICIAL SALE OF ALLOTMENT NO. 92 IN A PARTITION ACTION OF SNOHOMISH COUNTY SUPERIOR COURT CIVIL CAUSE NO. 76503 BY WHICH ALLOTMENT NO. 92 WAS SOLD CLEAR OF ALL TRUSTS AND RESTRICTIONS AGAINST ALIENATION IMPOSED BY THE UNITED STATES AS AUTHORIZED BY 25 USC § 403a-1?

2. WHETHER THE PURCHASE BY THE TULALIP TRIBE OF ALLOTMENT NO. 91 IN 1960 AND VOLUNTARILY PLACING TITLE THERETO IN THE UNITED STATES CREATED IN ALLOTMENT NO. 91 A DRY AND PASSIVE TRUST BY THE UNITED STATES WHICH DOES NOT COME WITHIN 28 USC § 1360?

3. WHETHER, ASSUMING ARGUENDO THAT ALLOTMENT NO. 91 IS HELD IN TRUST BY THE UNITED

STATES AND ALLOTMENT NO. 92 IS SUBJECT TO RESTRICTIONS AGAINST ALIENATION, SNOHOMISH COUNTY BY REQUIRING AN APPLICATION FOR A CONDITIONAL USE PERMIT WITHIN ITS ZONING ORDINANCE COVERING SANITARY LAND FILLS (assuring public health, safety, morals and welfare) IS AN "ENCUMBRANCE" WITHIN 28 USC § 1360?

4. WHETHER, ASSUMING ARGUENDO THAT ALLOTMENT NO. 91 IS HELD IN TRUST BY THE UNITED STATES AND ALLOTMENT NO. 92 IS SUBJECT TO RESTRICTIONS AGAINST ALIENATION AND ZONING IS NOT AN ENCUMBRANCE, THE STATE OF WASHINGTON PURSUANT TO PUBLIC LAW 280, 67 STAT. 588 (1953) AND B YCHAPTER 37.12 RCW, ASSUMED CIVIL AND CRIMINAL JURISDICTION OVER INDIANS AND THEIR LANDS WITH THE TULALIP TRIBE VOLUNTARILY COMING WITHIN THE STATE JURISDICTION, WAS SUFFICIENT TO ALLOW THE COUNTY OF SNOHOMISH TO REQUIRE A NON-INDIAN LESSEE TO APPLY FOR A CONDITIONAL USE PERMIT PURSUANT TO COUNTY ORDINANCE AND STATE LAW?

5. WHETHER, ASSUMING ARGUENDO THAT ALLOTMENT 91 IS HELD IN TRUST BY THE UNITED STATES AND ALLOTMENT 92 IS SUBJECT TO RESTRICTIONS AGAINST ALIENATION AND ZONING IS NOT AN ENCUMBRANCE; THE COUNTY ZONING ORDINANCE IS INCONSISTENT WITH ANY "FEDERAL TREATY, AGREEMENT, OR STATUTE OR WITH ANY REGULATION MADE PURSUANT THERETO" AS PROVIDED IN 28 USC § 1360?

6. WHETHER, ASSUMING ARGUENDO THAT ALLOTMENT 91 IS HELD IN TRUST BY THE UNITED STATES AND ALLOTMENT 92 IS SUBJECT TO RESTRICTIONS AGAINST ALIENATION, AND ZONING IS NOT AN ENCUMBRANCE, THE TULALIP TRIBES HAVE THE STATUTORY POWER TO EXCLUDE THE COUNTY ZONING ORDINANCE AND HAVE DONE SO BY ITS ORDINANCE NO. 29 AND, IF SO, IS THIS A DENIAL OF EQUAL PROTECTION OF THE LAWS?

7. WHETHER, ASSUMING ARGUENDO SUCH SAID ZONING ORDINANCE IS AN "ENCUMBRANCE", OR IF NOT, ASSUMING ARGUENDO SAID ZONING ORDINANCE IS INCONSISTENT WITH ANY "FEDERAL TREATY, AGREEMENT, OR STATUTE, OR WITH ANY REGULATION MADE PURSUANT THERETO," A NON-INDIAN SUBJECT TO ALL THE LAWS OF THE STATE OF WASHINGTON IS WITHIN THE STATUTES GOVERNING INDIANS BY LEASING LANDS OF THE TULALIP TRIBE FOR A PERIOD OF 10 YEARS WHERE THE CONSENT OF THE SECRETARY OF THE INTERIOR IS NOT REQUIRED NOR OBTAINED, AND IF SO, IS THIS A DENIAL OF EQUAL PROTECTION OF THE LAWS?

TREATIES AND STATUTES INVOLVED

The treaties and statutes involved are too numerous to set forth verbatim; accordingly, they are appended in Appendix B, as follows:

Pages

Treaty of Point Elliott, 12 Stat. 927 (1958)
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STATEMENT

1. FACTS

The Tulalip Indian Reservation is entirely within Snohomish County. On July 15, 1964, the Tulalip Tribes executed a ten (10) year lease of certain land on the reservation with the Seattle Disposal Company, a partnership whose members are not Indians. The lessees are to use the land in question solely for a garbage refuse or a sanitary land fill according to certain prescribed conditions (R. SF. 21).

The land leased consisted of two tracts acquired by the Tulalip Tribes at different times and under different circumstances. In November 1963, the Tulalip Tribes was the highest bidder at a public sale of the tract in question, designated Allotment 92 to one Richard Lawrence. The sale was pursuant to 25 USC 403a-1, in a partition proceeding in the Superior Court of the County of Snohomish, Civil Cause No. 76503. The Superior Court ordered (R. SF. 37-40) said Allotment 92 to be sold and upon such sale it would be free of any trust in the United States and free of any restraints against alienation imposed by the United States.

In February 1960, the Tulalip Tribes with tribal funds purchased the other tract in question. It was Allotment 91 to Jack Wheeler. At the time of the purchase, the Tulalip Tribes upon their voluntary act placed the legal title in the United States in trust for the Tribes (R. SF. 46).

Both Allotment 91 to Jack Wheeler and Allotment 92 to Richard Lawrence were made sometime prior to 1900 by deed from the President of the United States under the authority of the Treaty of Point Elliott of 1885, 12 Stat. 927 and the Sixth Article of the Treaty with the Omahas of 1854.

The lease was executed pursuant to Ordinance No. 29 of the Tulalip Tribes, which was promulgated on July 7, 1964 as authorized by the Tribal Constitution. By this and 25 USC § 477, the tribe executed the lease in question without the approval of the Secretary of Interior, his consent not being required.

The Tribal Constitution was legally effective by the approval of the Secretary of Interior on January 24, 1936, as authorized by the Indian Reorganization Act, 48 Stat. 984, 25 USC § 461 *et seq.* (June 18, 1934, Amended June 15, 1935).

Seattle Disposal Company made preparations and actually commenced operations under the lease. At that time, it had never made application with Snohomish County for a conditional use permit in accordance with County Zoning Ordinance No. 7 (R. SF. 25). Accordingly, the County of Snohomish instituted this injunction action in the Superior Court of Snohomish County until such an application for a conditional use permit was made.

By Public Law 280, Chap. 505, 67 Stat. 589 (1953), Congress consented to any state assuming criminal and civil urisdiction in accordance with the Act.

At that time, the State of Washington had a general disclaimer of jurisdiction over Indians. Art 26 of the Washington State Constitution. Thereafter, the Washington State Legislature by Chap. 240, Enacted Laws 1957, Amended Chap. 36, Laws of 1963, enabled the state to assume jurisdiction over Indians and their lands upon their consent and proclamation by the governor of the state, subject to restrictions in the Act (which are the same as the restrictions in Pub. Law 280, Chap. 505).

April 8, 1958, to the Governor of the State of Washington, the Tulalip Tribes by its Resolution No. 106 (R. BA 40) expressed its desire for and requested the application of the crim-

inal and civil jurisdiction of the State of Washington.

A proclamation by the Honorable Albert D. Rosellini, Governor of the State of Washington, declared (R. BA 40):

> ". . . that effective July 7, 1958, the criminal and civil jurisdiction of the State of Washington shall apply to the Tulalip Indian people, their reservation, territory, lands and country, and all persons being and residing therein."

2. PROCEDURE AND PROCEEDINGS

In December, 1964, Snohomish County filed a complaint in the Superior Court of Snohomish County against the Seattle Disposal Company to enjoin its activities of conducting a sanitary land fill in Snohomish County without applying for a conditional use permit (R. SF. 7).

In January 1965, the Tulalip Tribes filed a motion to intervene and at that time filed its answer, denying that the County of Snohomish had jurisdiction over the lands in question, and alleging affirmatively that the court lacked jurisdiction over the subject matter and that the complaint failed to state a claim. A few days later, January 29, 1965, the court entered its order granting the motion to intervene.

On February 15, 1965, the intervenor, Tulalip Tribes, moved for a summary judgment alleging the court lacked jurisdiction over the subject matter and praying the complaint be dismissed with prejudice. With this motion, the defendant Seattle Disposal Company concurred by its motion for summary judgment.

On March 4, 1965, the Seattle Disposal Company filed its answer, admitting and denying parts of the complaint and alleging in the affirmative that the court lacks jurisdiction over

the subject matter, that the complaint failed to state a claim and that Snohomish County failed to join an indispensable party defendant (R. SF. 27).

The motion for summary judgment was argued on different occasions prior to the court granting the motion and dismissing the complaint with prejudice by its order, dated May 14, 1965 (R. SF. 30). Snohomish County filed a timely notice of appeal.

3. STAGES AT WHICH FEDERAL QUESTIONS WERE RAISED

Snohomish County raised by argument and memorandum of authorities in the hearings on the motion for summary judgment and by assignment of error to the Supreme Court of the State of Washington (R. BA pp. 5-7) the following matters, among others:

"II

"Is Allotment No. 92 land 'belonging to any Indian, or Indians, or Indian Tribe, band, or community, that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States?'

III

"To what extent has the State of Washington assumed jurisdiction over the use of such land?

IV

"Is the requirement of a Conditional Use Permit as a condition precedent to the use of the land in question as a sanitary land fill inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto?

V

"Does the Tulalip Tribes have the power to regulate

the use of the land in question to the exclusion of Snohomish County?

VI

"Does the Zoning Ordinance of Snohomish County constitute an encumbrance upon the land in question?

VII

"Is a non-Indian lessee entitled to the benefits conferred on Indians by Public Law 280?"

The trial court in its memorandum decision (Appendix A, *infra*) answered the arguments and questions raised by Snohomish County as follows:

"Seattle Disposal Company and The Tulalip Tribes, are entitled to a judgment of dismissal of this cause as a matter of law for the reason that Allotments No. 91 and 92 of the Tulalip Indian Reservation located in Snohomish County, Washington, are tribal lands of the Tulalip Tribes of Washington, a duly organized Indian tribe created and existing pursuant to Sec. 16 of the Indian Reorganization Act (48 Stat. 984; 25 USC 461, et seq.) subject to the jurisdiction of the United States and of the Tulalip Tribes of Washington as tribal lands, having been acquired thereby by purchase pursuant to Federal law and regulation, with title to Allotment No. 91 being taken by the United States in trust for the Tulalip Tribes of Washington, and title to Allotment No. 92 being taken in the name of The Tulalip Tribes of Washington subject to restrictions against alienation as set forth in 25 USC 403-A2; that by reason of said trust status and restrictions against alienation no jurisdiction was vested over the use of said Allotments No. 91 and 92 in the State of Washington or any of its governmental agencies, including the County of Snohomish, under Public Law 208 of the United States, 25 USC 1360, or the laws of the State of Washington, RCW 37.12.050 and 37.12.060; that the zoning ordinances of the County of Snohomish constitute an encumbrance upon said trust and restricted

lands of THE TULALIP TRIBES by operation of law and constitute a regulation of the use of said trust and restricted lands, and said Allotments No. 91 and 92 are thereby by definition contained in the aforesaid 25 USC 1360 and RCW 37.12.060 exempted from the operation of the jurisdiction of any governmental division deriving its powers from the State of Washington; that in the exercise of the jurisdiction over said lands by the United States of America and pursuant to the Indian Reorganization Act, (48 Stat. 984; 25 USC 461, et seq.), the Tulalip Tribes of Washington have the power to the exclusion of the County of Snohomish to regulate the use of said tribal property and have done so by its Ordinance No. 29 allowing the use thereof as a sanitary land fill; that the zoning ordinances of the County of Snohomish requiring the securing of a conditional use permit from the Board of Adjustment of said county as a condition precedent to use of said tribal land by the operation of such a sanitary land fill are inconsistent with the Treaty of Point Elliot (Jan. 22, 1855, 12 Stats. 928), Federal laws and regulations of the United States made pursuant to said laws, as well as constituting an encumbrance upon said tribal lands by operation of law, . . ."

The Washington Supreme Court substationally followed the trial court decision, except it did not decide whether the Tulalip Tribal Ordinance No. 29 preempted the county zoning ordinance.

REASONS FOR GRANTING THIS WRIT

This case presents several problems of first impression, but basically it involves the jurisdiction of local government to impose its zoning laws on Indian tribal lands. This case *DOES NOT* relate to jurisdiction of the state to impose fishing regulations or hunting regulations on Indians, which is now before this Honorable Court in October Term 1967, No. 247, *The Puyallup Tribe v. Department of Game of the State of Washington*

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lands of THE TULALIP TRIBES by operation of law and constitute a regulation of the use of said trust and restricted lands, and said Allotments No. 91 and 92 are thereby by definition contained in the aforesaid 25 USC 1360 and RCW 37.12.060 exempted from the operation of the jurisdiction of any governmental division deriving its powers from the State of Washington; that in the exercise of the jurisdiction over said lands by the United States of America and pursuant to the Indian Reorganization Act, (48 Stat. 984; 25 USC 461, et seq.), the Tulalip Tribes of Washington have the power to the exclusion of the County of Snohomish to regulate the use of said tribal property and have done so by its Ordinance No. 29 allowing the use thereof as a sanitary land fill; that the zoning ordinances of the County of Snohomish requiring the securing of a conditional use permit from the Board of Adjustment of said county as a condition precedent to use of said tribal land by the operation of such a sanitary land fill are inconsistent with the Treaty of Point Elliot (Jan. 22, 1855, 12 Stats. 928), Federal laws and regulations of the United States made pursuant to said laws, as well as constituting an encumbrance upon said tribal lands by operation of law, . . ."

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and the Department of Fisheries of The State of Washington. Instead, this case presents, among other questions, a question on jurisdiction of the state to zone Indian land; a question not decided by any court in the United States prior to these proceedings; a question affecting every state in which an Indian tribe dwells; a question needed to be answered with commerce flowing over jurisdictional boundaries.

In light of recent rulings of federal circuit courts (specific reference *infra*) and the Washington Court herein, a no man's land outside of federal jurisdiction and state jurisdiction has developed. This Honorable Court is the only body which can draw definitive boundary lines. If a workable relation between Indian tribes and local government is to be obtained, the necessity of establishing responsibilities and obligations is evident. For these reasons and reasons hereinafter stated, the prayer for the writ should be granted.

1. *Whether Allotment No. 92 is subject to a restraint against alienation.*

The Washington court held that although the Tulalip Tribes purchased in fee Allotment No. 92 at a sale pursuant to a partition action in which the court ordered the sale to be free from federal trust and restrictions against alienation, restrictions against alienation were reimposed by law in 25 USC 403a and 403a-2.

There has been no case decided which construes these statutes. This is a case of first impression. However, principles enunciated in these statutes have been decided by earlier cases of this Honorable Court.

One problem is whether these statutes apply solely to land acquired by the Tulalip Tribes where that land is already re-

stricted or in trust, or they also apply to lands acquired in fee by the Tulalip Tribes. In *Pennock v. County Commisisoners*, 103 US 44, 26 L.Ed. 367 (1881), the Court held an Indian woman, who acquired under a treaty certain land and also received by assignment certain land allotted to other Indians under the same treaty, was not within the restriction of necessitating the Secretary of Interior's approval to sell such lands. The Court construed such restriction to apply only to the acquisition under the treaty and not to lands assigned under a different treaty. At 103 US p. 48, the Court said:

> ". . . When the patent of the Government is once issued for the lands, all restrictions upon their alienation, not expressly named, are gone. Without such designation, inability to alienate the property would be inconsistent with the perfect title which accompanies the patent."

Accordingly, the county could tax the lands in question. The enumerated principle is the elimination, not reimpositions, of restriction on Indian lands.

In addition, the Washington Supreme Court's opinion on this issue is in conflict with *Arenas v. U.S.*, 60 F.Supp. 411 (S.D. Cal. 1945) reversed on other grounds, 158 F.2d 730 (9th Cir. 1947). This case was remanded from the United States Supreme Court, 88 L.Ed. 1363 (1944). At 60 F.Supp. p. 426, the Court said:

> "Subsequent Acts of Congress, or the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 USCA §461 *et. seq.*, cannot vitiate vested rights.
>
> "Heretofore, when acts have been passed which seek to modify allotment rights and privileges, these acts have been generally construed as not intended to apply where allotments had already been selected, nor to affect the trust patenting of these selections . . ."

Most important is the case of *LaMotte v. United States*, 254 US 570, 65 L.Ed. 410 (1921), where Indians leased several lands, some of which were prior allotments to other Indians and became unrestricted. As to these, the Court at 254 US, p. 580, said:

> "Some of the leases are for lands which were purchased by the lessors after the lands in regular courts had become unrestricted. Because the lessors were members of the tribe, and without certificates of competency, the circuit court of appeals held that leases were subject to the Secretary's approval. The district court had held the other way. We think the district court was right. There is no provision in the Act of 1906 or that of 1912 which reimposes restrictions after they have been removed, or which subjects to restrictions all lands, however acquired, which a member without a certificate of competency may own . . ."

Assuming arguendo that Allotment No. 92 is subject to restrictions against alienation, the Tulalip Tribes have the power of voluntary disposition. Such power as enunciated by the principles set forth in *Goudy v. Meath*, 203 US 146, 51 L.Ed. 130 (1906), places the land within the taxing jurisdiction of the County, notwithstanding the allottee therein had not exercised his power of voluntary sale. With regard to this, the Court at 203 US p. 149, said:

> "That Congress may grant the power of voluntary sale while withholding the land from taxation or forced alienation may be conceded . . . But while Congress may make such provision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time

releasing it from taxation — in other words, that the officers of a state enforcing its laws cannot be trusted to do justice, although each and every individual acting for himself may be so trusted."

This principle of an Indian allottee with the ability to voluntarily alienate his land is applicable to the Tulalip Tribes holding Allotment No. 92 in fee with power to sell where it leases that land under its own terms without the consent of the Secretary of Interior.

2. *Whether Allotment No.* 91 *is held in "trust" by the United States.*

Allotment No. 91 was purchased in 1960 by the Tulalip Tribes with tribal funds; title thereto was placed voluntarily in the United States in trust. The trust is a dry and passive one. Even though, the trial court and Washington State Supreme Court held such was a trust within 28 USC §1360. However, the Court in *Bailess v. Paukune*, 344 US 171, 97 L.Ed. 197, 73 S.Ct. 198 (1952), indicated a dry and passive trust is not within the protected class. The Court said:

"... If she (a non-Indian) is not within the class whom Congress sought to protect, the trust is a dry and passive one; there remains only a ministerial act for the trustee to perform, namely, the issuance of a fee patent to the cestui."

Similarly, if the trust status of Allotment No. 91 is not within the class Congress sought to protect, or it is a dry and passive one over which the federal government does nothing, it is within the state jurisdiction.

3. *Whether a county zoning ordinance requiring an application for a conditional use permit constitutes an "encumbrance" within* 25 *USC* §1360 (*b*) *and RCW* 37.12.060.

This question is also one of first impression for the courts. The Washington Court construing the word "encumbrance" to include state authorized zoning laws, is contrary to the purpose of the restrictions on alienation as enunciated by this Court in *Goudy v. Meath, supra, viz,* the protection of the Indian against the cunning white people and not local government.

The Washington Supreme Court buttressed its interpretation by saying.

> ". . . We find nothing in Public Law 280 or in other applicable law to indicate an intention to the contrary. Thus, we conclude that, even apart from the inclusion of zoning ordinances within the word encumbrance, the federal government has not intended to allow states or their governmental agencies to interfere with the use of restricted Indian lands by means of zoning ordinances.

This is contrary to rules of interpretation as set forth in *Goudy v. Meath, supra,* and *In Re Huff,* 197 US 488 (1905). Also, it flies in the face of the purpose of Public Law No. 280 as set forth in House Rept. No. 848, *viz,* to relinquish federal jurisdiction over Indian lands to the State of Washington upon its enactment of legislation, which was done. See Chap. 37.12, RCW.

Also, the interpretation of the word "encumbrance" to include a county zoning ordinance is contrary to the purpose and policy as set in 25 USC §231, allowing state inspection for enforcement of health and sanitation regulations.

To construe zoning as an "encumbrance" would prohibit zoning where the land is restricted, but would allow zoning where the land is unrestricted in the hands of individual Indian allottees. Such result would require the burden of searching the records for each tract. A burden found unreasonable and im-

practical by this Court in *Seymour v. Superintendent*, 368 US 351, 358, 7 L.Ed. 2d 346, 351 (1962):

> ". . . Where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense . . . is in the State or Federal Government. Such (is) an impractical pattern of checkerboard jurisdiction . . ."

Moreover, the word "encumbrance" as affecting the jurisdiction of local government refers to "proprietary interests" and not "governmental." In *Organized Village of Kake v. Egan*, 369 US 60, 7 L.Ed. 2d 573 (1962), the Court construed the retention of "absolute jurisdiction and control" over Indian lands by the Federal government as provided in §4 of the Statehood Act as meaning undiminished, not exclusive. With regard to the provision of §4 of that Act, if the state disclaimed any right and title, the Court found this was a disclaimer of proprietary, rather than governmental, interest.

The *Egan* case specifically allows concurrent and overlapping jurisdiction in certain areas. In zoning under the Washington court's rule in the instant case and the principles enunciated by *Quinalt Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966), a new type of nonjurisdiction has been established outside of either state or federal control.

By construing "encumbrance" to embrace zoning, the Washington Court is curtailing that state governmental jurisdiction authorized and adopted in this case by Congress in Pub. Law 280. On the other hand, the *Gallagher* case, *supra*, finds no claim

stated where the Quinalt tribe sue for declaratory judgment and injunction to prevent the enforcement of Washington State civil and criminal laws on the reservation. The Court leaves the tribe to state law by saying at p. 658:

> ". . . If the Quinalt Tribe of Indians feels aggrieved because state jurisdiction is not presently being exerted to the full extent possible under Chapter 36, all it has to do is provide the governor with a tribal resolution . . ."

Here the Tulalip Tribes have so passed a resolution, yet the Washington Court denies jurisdiction of state police laws. The two cases cannot be reconciled on who has jurisdiction; a void exists.

4. *Whether a Non-Indian Lease Is Within Protection of The Federal Statutes.*

The Washington Supreme Court held that a non-Indian lessee is entitled to benefits of Indians under Federal Law. This is directly in conflict with holdings of this Court: *Levindale L. &Z. Min. Co. v. Coleman*, 241 US 432, 60 L.Ed. 1080 (1916); and *Bailess v. Paukune*, 344 US 171, 97 L.Ed. 197, 73 S.Ct. 198 (1952).

In the *Levindale* case, *supra*, a white man was married to an Indian woman who, along with her child, received allotments subject to restrictions against alienation by the Allotment Act of June 28, 1966. Upon the death of the Indian woman and child, the white husband inherited an undivided one-half interest in her allotment and a three-fourths undivided interest in the child's. They had not been partitioned. He later conveyed his interest to the Mining Company. The white husband then brought suit to set aside his conveyance as being in violation of the treaty and subject to restriction.

Section seven of that Allotment Act provided that members of the tribe and their heirs had power to lease. The husband argued by this, he being an heir, he was within the Act. The Court rejected the argument by saying at 241 US p. 438:

> ". . . this provision as to leases, in the light of the purpose of the Act, had reference, we think, to the 'individual members' who received allotments and the Indian heirs of such members."

The Court expressed the policy of the Allotment Act, at 241 US p. 437, as follows:

> "The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians, wards of the United States. The establishment of restrictions against alienation 'evinced the continuance, to this extent, at least, of the guardianship which the United States had exercised from the beginning.' (Citing cases.) This policy did not embrace white men — persons not of Indian blood — who were not as Indians under national protection, although they might inherit lands from Indians; and, *with respect to such persons, it would require clear language to show an intent to impose restrictions.*" (Emphasis added.)

In *Bailess v. Paukune, supra,* an Indian was allotted land. He subsequently died. Without a patent fee being issued to the widow and the land still in trust for the deceased Indian, the State of Oklahoma issued an ad valorem tax on the land and later advertised it for sale. The widow brought suit to enjoin such a sale. The Court held if the widow was not an Indian, she was not within the protected class. The case was remanded for this determination.

The Washington court also was contrary to *Choctaw, Oklahoma & Gulf R. Co. v. Mackey*, 256 US 531, 65 L.Ed. 1076 (1921), (sustaining a state real property tax on the lessee's railroad right of way over Indian-lessor's land) and to *Oklahoma Tax Commission v. Texas Company*, 336 US 342, 93 L.Ed. 721 (1948), (sustaining a state ad valorem tax and excise tax on a lessee's mineral rights in allotted and restricted Indian lands.)

5. *Whether the State of Washington Assuming Jurisdiction Is In Conflict With Federal Law.*

This issue was presented to the Washington Supreme Court (R.AB. p. 50), but it did not reach the issue.

By Public Law 280, Chap. 505, 67 Stat. 589 (1953), Congress consented to any state assuming criminal and civil jurisdiction over Indians. Thereafter, Washington legislature amended its laws by Chap. 240, Enacted Laws 1957, Amended Chap. 36, Laws of 1963, enabling the state to assume criminal and civil jurisdiction over Indians and their lands, upon their consent and proclamation by the governor of Washington, subject to the restrictions in 28 USC §1360.

In 1958, the Tulalip Tribes so consented and the governor issued a proclamation, declaring (R. BA 40):

> ". . . that effective July 7, 1958 the criminal and civil jurisdiction of the State of Washington shall apply to the Tulalip Indian people, their reservation, territory, lands and country, and all persons being and residing therein."

Under the restriction of the state jurisdiction in 28 USC § 1360, among others, the restricted lands cannot be encumbered, nor can the state act inconsistent with any federal regulation. There is no federal regulation covering the case at bar.

6. *Whether a tribal ordinance inconsistent with a county zoning ordinance controls.*

This issue was presented to the Supreme Court of Washington (R. AB p. 50), but it did not decide the issue. The Superior Court, however, in its order granting summary judgment, stated (R. Appendix A-):

> ". . . that in the exercise of the jurisdiction over said lands by the United States of America and pursuant to the Indian Reservation Act (48 Stat. 984; 25 USC 461, et seq.), the Tulalip Tribes of Washington have the power to the exclusion of the County of Snohomish to regulate the use of said tribal property and have done so by its Ordinance No. 29 allowing the use thereof as a sanitary land fill."

This is a question of first impression, but the Congress and Washington legislature have clearly decided it. Both Public Law 280 and Enacted Laws, 1957, Chap. 240, provide that:

> "1. A federal regulation regulating the use of trust or restricted property takes precedence over a state's regulation of such property.
>
> "2. However, a state's regulation of the use of trust or restricted property takes precedence over any tribal ordinance inconsistent with the state's regulation."

The trial court's decision on this point is clearly in conflict.

Notwithstanding, its decision is contrary to *William v. Lee*, 358 US 217, 3 L.Ed. 2d 251 (1959), holding a non-Indian could not sue Indians in state courts where the Indians have established their own courts and have not assented to the jurisdiction of any state that has consented to such jurisdiction. If, however, the state assumed jurisdiction and the Indians consent thereto, the Indians are within the state law, notwithstanding any of their regulations.

In addition, *Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967), held that a controversy between individual Indians and a tribal organization concerning the tribal constitution and by-laws was not within the federal jurisdiction. The individual Indians asserted district court jurisdiction by the Indian Reorganization Act, 25 USCA § 477. The Court at p. 531 answered:

> ". . . This argument is unacceptable, as a close reading of that Act reveals its limited scope. The Act merely provides the authority and procedures whereby an Indian tribe may organize itself and adapt a tribal constitution and by-laws. The Act makes no mention of jurisdiction in any sense and such is not within its purview . . ."

In the case at bar, the Tulalip Indians have consented to the civil and criminal laws of the State of Washington, which has assumed such jurisdiction.

7. *Whether the lease in question, being outside of state zoning laws, is a denial of equal protection.*

Petitioner herein argued on appeal to the Washington State Supreme Court that to hold the Tribal Ordinance No. 29 to preempt the County Zoning Ordinance would be a denial of equal protection of the laws (R.AB. pp 66-67). The Supreme Court held, "Where there is no jurisdiction, there can be no denial of equal protection of the laws."

This is a question of first impression. The Tulalip Indians are citizens of the United States and of the State of Washington. 8 USCA 1401(2). Accordingly, they are entitled, as are all citizens, to equal protection of the laws that are for the general welfare under the "police powers". Within Article 1 § 12 Washington State Constitution; XIV Amendment of the United States Constitution and Article 4 § 2 of the United States Constitution.

CONCLUSION

The petitioner herein has raised several reasons for granting this Writ, but state zoning of tribal lands casts its shadow on the face of this nation for the first time. Years of litigation left it buried. Only commerce knowing no jurisdiction raised this question to light. The same commerce as in all states.

Other states will be presented with this question. The case before the bar will guide those. For this reason and reasons hereinbefore stated, the petitioner respectfully prays that the Writ be granted.

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

SNOHOMISH COUNTY,
a municipal corporation,
Plaintiff,

vs.

SEATTLE DISPOSAL COMPANY,
Defendant,

THE TULALIP TRIBES,
a Federal corporation,
Intervener-Defendant.

No. 81760

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER coming on regularly for hearing before the above entitled court this 30th day of April, 1965, with the Honorable Charles R. Denney, presiding, on the motion of the defendant, SEATTLE DISPOSAL COMPANY, and for intervener-defendant, THE TULALIP TRIBES, for summary judgment with the County of Snohomish being represented by Robert Schillberg, its prosecuting attorney, and Sten Dagg, its deputy prosecuting attorney, the SEATTLE DISPOSAL COMPANY by Julian C. Dewell for Chadwick, Chadwick & Mills, its attorney, and the TULALIP TRIBES by Lewis A. Bell, of Bell, Ingram & Smith, its attorneys, and the court having considered the records and files herein together with the briefs of the respective parties and the motions and affidavits filed in support of the Motion for Summary Judgment, and having heard argument at length by respective counsel finds that there is no genuine issue in said cause as to any material fact and that the aforesaid moving parties, SEATTLE DISPOSAL COMPANY and THE TULALIP TRIBES, are entitled to a judgment of dismissal of this cause as a matter of law for the

reason that Allotments No. 91 and 92 of the Tulalip Indian Reservation located in Snohomish County, Washington, are tribal lands of the Tulalip Tribes of Washington, a duly organized Indian tribe created and existing pursuant to Sec. 16 of the Indian Reorganization Act (48 Stat. 984; 25 USC 461, et seq.) subject to the jurisdiction of the United States and of The Tulalip Tribes of Washington as tribal lands, having been acquired thereby by purchase pursuant to Federal law and regulation, with title to Allotment No. 91 being taken by the United States in trust for the Tulalip Tribes of Washington, and title to Allotment No. 92 being taken in the name of The Tulalip Tribes of Washington subject to restrictions against alienation as set forth in 25 USC 403-A2; that by reason of said trust status and restrictions against alienation no jurisdiction was vested over the use of said Allotments No. 91 and 92 in the State of Washington or any of its governmental agencies, including the County of Snohomish, under Public Law 208 of the United States, 25 USC 1360, or the laws of the State of Washington, RCW 37.12.050 and 37.12.060; that the zoning ordinances of the County of Snohomish constitute an encumbrance upon said trust and restricted lands of THE TULALIP TRIBES by operation of law and constitute a regulation of the use of said trust and restricted lands, and said Allotments No. 91 and 92 are thereby by definition contained in the aforesaid 25 USC 1360 and RCW 37.12.060 exempted from the operation of the jurisdiction of any governmental division deriving its powers from the State of Washington; that in the exercise of the jurisdiction over said lands by the United States of America and pursuant to the Indian Reorganization Act, (48 Stat. 984, 25 USC 461, et seq.), the Tulalip Tribes of Washington have the power to the exclusion of the County of Snohomish to regulate the use of said tribal property and have done so by its Ordinance

No. 29 allowing the use thereof as a sanitary land fill; that the zoning ordinances of the County of Snohomish requiring the securing of a conditional use permit from the Board of Adjustment of said county as a condition precedent to use of said tribal land by the operation of such a sanitary land fill are inconsistent with the Treaty of Point Elliot (Jan. 22, 1855, 12 Stats. 928), Federal laws and regulations of the United States made pursuant to said laws, as well as constituting an encumbrance upon said tribal lands by operation of law.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the motion of THE TULALIP TRIBES as intervener defendant and of the SEATTLE DISPOSAL COMPANY as defendant for summary judgment in the above entitled matter be and the same is hereby granted and the above entitled action be and the same is hereby dismissed with prejudice and without cost to any of the parties hereto.

DONE IN OPEN COURT this 14th day of May, 1965.

s/ Charles R. Denney
Judge

Copy received and Notice
of Presentment waived:
s/ Julian C. Dewell
Attorney for Defendant

May 14, 1965
Approved only as to form and Notice
of Presentment waived:
s/ Sten Dagg
Attorney for Plaintiff

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY,
a municipal corporation,
Appellant,

v.

SEATTLE DISPOSAL COMPANY,
Respondent.

THE TULALIP TRIBES,
a Federal corporation,
Intervenor/Respondent.

No. 38550

EN BANC

Filed Mar. 9, 1957.

The defendant Seattle Disposal Company leased land known as Allotments 91 and 92 from the intervenor, the Tulalip Tribes, for the purpose of operating what is called a sanitary landfill garbage and refuse disposal site. The lease was authorized by Ordinance No. 29 passed by the Tulalip Tribes, an Indian group organized as a federal corporation pursuant to the Indian Reorganization Act, 48 Stat. 988, 25 U.S.C. § 477.

Allotment 91 was purchased in 1960 in the name of the United States in trust for the Tulalip Tribes. The Tulalip Tribes purchased Allotment 92 at a Snohomish County Superior Court sale in November of 1963. Both parcels of land are located within the Tulalip Indian Reservation and within Snohomish County. Under Snohomish County Zoning Ordinance No. 7, as amended, a conditional use permit is required in order to carry on garbage disposal operations, except on lands exempt from county regulation. Neither Seattle Disposal nor the Tulalip Tribes ever applied for a permit to allow garbage operations on Allotments 91 and 92, and such a permit was never issued.

The plaintiff, Snohomish County, brought suit against Se-

attle Disposal, seeking an injunction to prevent Seattle Disposal from disposing of, or preparing to dispose of, garbage within the county without first procuring a conditional use permit. The Tulalip Tribes moved for leave to intervene, and the trial court granted permission to do so. Both Seattle Disposal and the Tulalip Tribes moved for summary judgment on the basis that the court lacked jurisdiction over the subject matter of the action. The trial court granted summary judgment in accordance with the motions on the grounds, among others, that the state and its governmental agencies have no jurisdiction over the use of the land in question, that the zoning ordinance if applied to Allotments 91 and 92 would constitute an encumbrance in violation of 28 U.S.C. § 1360 and RCW 37.12.060, and that the Tulalip Tribes have the power to the exclusion of the county or state to regulate the use of the land in question and have done so by Ordinance No. 29. The county has appealed.

The plaintiff county contends that the use of the lands in question is within the jurisdiction of the State of Washington. The county relies in part on the General Allotment Act, ch. 119, § 6, 24 Stat. 390 (1887), which provided that lands would be allotted to individual Indians, and that such lands would be held in trust by the United States for the allottees for 25 years, at the end of which the land would be patented in fee to the allottees. The General Allotment Act further provided that at *the issuance of the patent in fee* the allottees would become subject to the civil and criminal laws of the state or territory in which they resided. *Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957). The record discloses that Allotments 91 and 92 were allotted to individual Indians by executive order pursuant to the Point Elliott Treaty of 1855, 12 Stat. 927, and the sixth article of the Treaty with the Omahas of 1854, 10 Stat. 1043, and not by

virtue of the General Allotment Act of 1887. We thus have no occasion to determine whether, in view of 34 Stat. 326 (1906) and 48 Stat. 984 (1934), 25 U.S.C. § 462, which extended existing periods of trust, any jurisdiction over Indians was ever relinquished by the federal government by virtue of the General Allotment Act of 1887.

The county's alternative position is that Public Law 280, 67 Stat. 589 (1953), as amended and codified in 28 U.S.C., § 1360, operated as an authorization for Washington to assume jurisdiction, and that ch. 240, Laws of 1957, as amended by ch. 36, Laws of 1963, now codified as RCW 37.12, acted as the consent of the people, in terms of art. 26 of the Washington Constitution, to the assumption of civil and criminal jurisdiction over Indians and their lands within the state. This general proposition is clearly the law, and the Tulalip Tribe has voluntarily come within this grant of state jurisdiction. *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33 (1959). The county further recognizes the limitation on this assumption of jurisdiction, which appears in RCW 37.12.060 as taken from 28 U.S.C., § 1360, which reads as follows:

> Chapter limited in application. *Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property,* including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community *that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States;* or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto . . . (Italics ours.)

There is no question but that Allotment 91, title to which was taken in the name of the United States in trust for the

Tulalip Indians, comes within the limitation expressed in RCW 37.12.060. The county argues, however, that Allotment 92 does not come within the terms of this limitation. We disagree. Allotment 92 was *sold* free and clear of all trusts or restraints against alienation, pursuant to 70 Stat. 290, 25 U.S.C., § 403a-1, at the judicial sale in the partition action of Snohomish County Superior Court Civil Cause No. 76503. However, the purchase of Allotment 92 by the Tulalip Tribes reimposed the requirement, under 54 Stat. 1957, 25 U.S.C., § 403a and 70 Stat. 290, 25 U.S.C. § 403a-2, that any long term lease or sale of this land be made only with the consent of the Secretary of the Interior. The necessity of the Secretary's approval constitutes a restriction against alienation imposed by the United States. See *La Motte v. United States*, 254 U.S. 570 (1921). Thus the limitation stated in RCW 37.12.060 and 28 U.S.C., § 1360, applies, and the state is without authority to encumber or tax either Allotment 92 or 91.

The county argues that the application of zoning ordinance No. 7 to the land in question, particularly the mere requirement of application for a conditional use permit, does not constitute an "encumbrance" on the property. The requirement of a permit is part and parcel of the zoning ordinance, and if the ordinance cannot be applied to the land involved neither can the requirement of a permit.

This court has said in the past that any "burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee" constitutes an encumbrance. *Hebb v. Severson*, 32 Wn. 2d 159, 167, 201 P.2d 156, 160 (1948). The application of the zoning ordinance to prohibit or limit the use of this land for commercial purposes

certainly could be considered to diminish its value. We agree with the approach taken by the United States Supreme Court in *Squire v. Capoeman*, 351 U.S. 1 (1956). In that case the Court concluded that the words "charge or encumbrance," as they appear in the General Allotment Act of 1887, should be interpreted broadly, and any doubt should be resolved in favor of the Indians for whose benefit that legislation, as well as the legislation before us, was intended. We, therefore, hold that Snohomish County Zoning Ordinance No. 7, if construed to apply to Allotments 91 and 92, constitutes an encumbrance within the meaning of 28 U.S.C., § 1360, and RCW 37.12.060.

We find support for this result in an opinion by the Acting Solicitor for the Department of the Interior which concludes that the state in the exercise of its police power may not interfere by zoning ordinance with land held by the United States in trust for Indians. 58 I.D. 52 (1942). See, also, an opinion of the Washington Attorney General, AGO 59-60, No. 59 (1959), in which the same conclusion is reached. We find nothing in Public Law 280 or in other applicable federal law to indicate an intention to the contrary. Thus, we conclude that, even apart from the inclusion of zoning ordinances within the word encumbrance, the federal government has not intended to allow states or their governmental agencies to interfere with the use of restricted Indian lands by means of zoning ordinances.

The county also argues that since Seattle Disposal is a non-Indian organization it should not be able to benefit from the special rights or privileges granted to Indians. The Tulalip Indians are clearly authorized, subject to the regulation of the Secretary of the Interior, to make commercial leases for substantially unlimited purposes. See 54 Stat. 1057, 25 U.S.C., § 403a; 60 Stat. 962, 25 U.S.C., § 403b; and 69 Stat. 539, 25 U.S.C., §

415. Limitation on the use to which a lessee from the Tulalip Tribes can put Indian lands is limiting the Indian use. The county cannot indirectly accomplish federally prohibited interference with property that it could not accomplish directly. See AGO, No. 59 (1959); *Jordan v. O'Brien*, 70 S.D. 393, 18 N.W. 2d 30 (1945); *United States v. County of Allegheny*, 332 U.S. 174 (1944).

The county also contends that to hold that the zoning ordinance does not apply to the lands in question and to allow Indian self-regulation would deny to the members of the Tulalip Tribes and to residents of adjoining lands the equal protection of the laws. This novel argument would find a denial of equal protection in each of the myriad cases of juxtaposed but different regulation by different sovereigns in our system of federalism. We have already determined that this state has no jurisdiction to control either directly or indirectly the use of the Indian lands in question. Where there is no jurisdiction, there can be no denial of equal protection.

We are aware of the Congressional intent to make Indians as nearly as possible full and equal citizens. We are also aware of the intent, clearly expressed in 60 Stat. 962, 25 U.S.C., § 403b, and 69 Stat. 539, 25 U.S.C., § 415, to promote Indian commercial activities. See, also, Kelly, *The Economic Basis of Indian Life*, 311 ANNALS OF AM. ACADEMY OF POLIT. AND SO. SCIENCE 71 (May 1957). That our decision today promotes the latter policy rather than the former is not the result of a judgment as to competing values, but rather a determination as to what to us clearly seems to be the applicable law. The state has, of course, been granted jurisdiction to inspect and regulate health, sanitation, and related matters on Indian tribal lands. 45 Stat. 1185, 25 U.S.C., § 231. In the matter of the regula-

tion of the use of restricted Indian lands, however, the United States has conferred on the Indians a degree of immunity from regulation by state and local government, and only the United States can remove this immunity. *Cf. Dept. of Game v. The Puyallup Tribes, Inc.*, 70 W.D. 2d 241, 422 P.2d 754 (1966).

The judgment is affirmed.

FINLEY, J.

WE CONCUR:
DONWORTH, J.
HILL, J.
ROSELLINI, J.
HUNTER, J.
LANGENBACH, J. Pro Tem

No. 38550

HALE, J. (dissenting)—I dissent for three reasons: (1) Zoning laws, it seems to me, are not encumbrances on land but rather are an exercise of the police power to foster the public welfare, health and safety; (2) although Indian reservations may be partially immune from state regulations, this immunity ought not extend to activities which immediately and directly affect the citizenry at large; and (3) any immunity from the state's police regulations enjoyed by the Indians for activities on the reservation should not cover their non-Indian lessees or assigns. I believe, therefore, that neither Indians nor their lessees may operate a garbage dump on the reservation in violation of the zoning laws of Snohomish County.

As the majority has said, Indians of the Tulalip reservation voluntarily acceded to state jurisdiction for enforcement of the criminal law, thus directly bringing the reservation as a matter of principle within the police power of the state. 28

U.S.C. § 1360; RCW 37.12; *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33 (1959). The majority opinion, however, sidetracks the right of the state to achieve desirable state ends through a reasonable exercise of its police power and, in excluding the reservation from operation of the zoning regulations, largely ignores state police powers expressed through county regulations. It premises its holding mainly on the idea that the zoning laws of Snohomish County constitute an encumbrance on land under 28 U.S.C. § 1360(b), a statute which says "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property."

I recognize, of course, that the majority uses the term "encumbrance" in a general sense as indicating any substantial limitation of or condition upon the use of one's property and not as a word of art, denoting more specifically a covenant, easement, lien, or burden running with the land and attached to the title thereto. The broad general meaning employed by the majority, however, in my opinion, is not called for by the statute. The term "encumbrance" should be given its more definitive and precise meaning—one denoting a burden on the land and affecting the title thereto or one impairing the power of alienation such as a mortgage, lien, easement, lease, or other disability to fee ownership.

Although zoning laws do impair the uses to which one may put his land, from their inception they have not been deemed an encumbrance on real estate. In 1920, the Court of Appeals of New York in *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 317, 128 N.E. 209 (1920), said of zoning restrictions:

> In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution was not

an incumbrance, since it was proper exercise of the police power.

Virtually the same statement was made in *Miller v. Milwaukee Odd Fellows Temple*, 206 Wis. 547, 240 N.W. 193 (1932). Accord: *Hall v. Risley*, 188 Ore. 69, 213 P.2d 818 (1950); *Lohmeyer v. Bower*, 170 Kan. 442, 227 P.2d 102 (1950), the latter case holding expressly that municipal restrictions on the use of land existing at the time a sale of real estate is completed are not encumbrances on land so as to enable the vendee to avoid his contract to purchase on the ground the restrictions rendered his title unmerchantable. Were zoning regulations regarded as encumbrances on land in the legal sense, the courts at their inception would have held them to constitute a taking or damaging of real estate under the state's power of eminent domain and not simply an expression of the police power.

Although zoning laws, as with other manifestations of the police power, do impair to some degree the untrammelled enjoyment of land, they are, nevertheless, constitutionally sustainable on the universally accepted theory that they represent an expression of the state's police power. 101 C.J.S. *Zoning* § 7 (1958); 8 McQuillin, Municipal Corporations § 25.10 (1965).

Thus, they have been regarded judicially as similar to other laws affecting the use of real property, such as codes fixing standards for plumbing, electrical wiring and building, and drainage and sewerage regulations, along with rules governing the disposition and collection of refuse and garbage. All — even though they do in one way or another interfere with the use of property—are constitutionally acceptable as a legitimate means of fostering the general welfare and contributing to the public peace, health, safety and morals under the police power. The courts recognize that conditions of life, work, recreation and

leisure are directly affected by the location of manufacturing and processing plants, facilities for trade, commerce and finance, the location of parks, playgrounds and highways, freedom from air and water pollution, access to air and sunlight and open spaces and, of course, facilities for the disposition of refuse and garbage.

Hence, I am of the opinion that the right of the Tulalip Indians and their lessees to put a garbage dump on their reservation is not a right running with the land, but rather a privilege to be exercised under the police power in common with all other landowners in the county.

I presume that Indians born in the United States and residing in Washington are citizens of the United States and of the State of Washington. 8 U.S.C. § 1401. Therefore, they assume the same responsibilities as all other citizens, subject to no privileges and immunities not shared equally by all citizens. Thus, while their land within the reservation, because of its exceptional derivation of title, may be free from some of the restrictions which curtail other landowners, the special nature of that ownership does not make an Indian reservation a foreign country, inhabited as it is by citizens of the United States and the State of Washington. We must not lose sight of the fact that the Tulalips are Americans living in Snohomish County, Washington, United States of America.

I see a sensible distinction available in deciding whether the police power of the state extends to the Indian reservation in a particular case. If the action or omissions prohibited by the police power are of the kind which directly injure or endanger the surrounding area and its inhabitants or the state's citizenry at large, or reasonably appear to do so, then the In-

dians ought not be permitted to flout the state's laws enacted to preserve the public peace, health, safety and welfare from the very injuries and dangers which the police regulations were reasonably designed to prevent or curtail. That the Congress recognizes this principle may be inferred from its enactment of 25 U.S.C. § 231 mandating the Secretary of the Interior to allow the states to enforce health, sanitation and educational laws on Indian reservations, as follows:

> The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application.

Therefore, unless federal legislation directly prohibits the exercise of state jurisdiction, the state, I believe, may and should exercise its police power over Indian reservations as far as may be reasonably necessary to preserve the peace, safety and welfar of its citizens—including, of course, its Indian citizens. 27 Am. Jur. *Indians* § 48 (1940). A different rule would prevent the state, in the reasonable exercise of the police power, from enforcing on the reservation such laws as are designed to prevent contamination of the state's waters; control and reduce air pollution, quell riots and public disturbances likely to spread to adjoining areas; quarantine and treat epidemic diseases in imminent danger of spreading throughout the state; suppress loud

and protracted noises emanating from the reservation to the disturbance of non-Indians living nearby; enforce compliance with electrical safety codes designed to protect all users of the electrical system; enforce fire control and safety regulations, which, if ignored may set an entire district of the state ablaze; and capture dangerous criminals.

Therefore, if the state may exercise its sovereign powers to protect its people, including its citizens of Indian extraction, from these innumerable hazards and possesses a jurisdiction over Indian reservations not directly prohibited by federal legislation, it has the power to enforce on the reservation the laws reasonably designed to protect all of its citizens, Indian or non-Indian alike, from such hazards and dangers originating on the reservation which directly threaten the peace, repose, welfare and safety of all citizens.

I include zoning regulations among these laws and, therefore would hold that the Indians of the Tulalip reservation are without legal authority to convert a part of their reservation into a commercial garbage dump unless they proceed in pursuance of and according to the zoning regulations of Snohomish County.

As to the Seattle Disposal Company, I find little basis in Indian law for that company to operate a garbage dump on the reservation in violation of the county zoning laws any more than a lessee of mineral rights on Indian lands was immune from state taxes on gross production. *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 93 L.Ed. 721, 69 Sup. Ct. 561 (1949). Similarly, the transaction of business on an Indian reservation by a non-Indian with non-Indians has been held not exempt from the state's business and occupation tax. Situs of the transaction on

the reservation did not remove the non-Indian entrepreneurs from the state's taxing powers. *Neah Bay Fish Co. v. Krummel*, 3 Wn. 2d 570, 101 P.2d 600 (1940). Accord: *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L. Ed. 1091, 50 Sup. Ct. 455 (1930).

That the privileges and immunities of reservation Indians are not assignable or negotiable may be seen from the general rule asserted in Association on American Indian Affairs, Federal Indian Law 513 (1966), prepared by the Solicitor General for the epartment of the Interior, where it is stated as a general rule that:

> (T)he Indian country within a State ordinarily is not regarded as an area of exclusive Federal jurisdiction but is politically and governmentally a part of the State in which State laws apply to the extent that they do not conflict with Federal Indian law.

Federal Indian laws, being protective in nature, were enacted to govern the Indians only; they limit the operation of state laws only where "Enactments of the Federal Government passed to protect and guard its Indian wards *only* affect the the operation, within the colony (or reservation), of such state laws as conflict with the federal enactments." (Italics mine). Federal Indian Law, *supra*, at 513. I find no federal legislation guarding or protecting a commercial garbage dump as a business on the reservation, and hence, I am unable to see how the Snohomish County zoning laws can be considered in conflict with federal enactments.

As far as I can determine from the record, the Seattle Disposal Company is a non-Indian entity purposing to engage in a non-Indian and nonfederal activity on a reservation. Being both non-Indian and nonfederal, the company does not, in my

opinion, enjoy any of the immunities and privileges which may by federal law have been conferred upon its Indian wards.

I would, therefore, reverse.

HALE, J.

We concur in the result of the dissent.

HAMILTON, J.
WEAVER, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY, *Appellant,* vs. SEATTLE DISPOSAL COMPANY et al., *Respondents.*	No. 38550 Department..... ORDER DENYING PETITION FOR REHEARING

The Court having considered the appellant's petition for a rehearing herein and a majority of the Judges being of the opinion that it should be denied,

IT IS ORDERED that the petition be and it is hereby denied.

Dated this 2nd day of June, 1967.

By the Court:

R C. FINLEY
Chief Justice

70 W.D.2d 645

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY, a municipal corporation, *Appellant*, v. SEATTLE DISPOSAL COMPANY and TULALIP TRIBES, a federal corporation, *Respondents.*	REMITTITUR No. 38550 Snohomish County No. 81760

The State of Washington to: The Superior Court of the State of Washington in and for Snohomish County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on March 9, 1967, became the final judgment of this court in the above entitled case on June 2, 1967. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Two hundred ninety-four and 03/100 dollars ($294.03) in favor of respondent Seattle Disposal Company and One hundred sixty-six and 03/100 dollars ($166.03) in favor of respondent The Tulalip Tribes and against appellant, Snohomish County.

The Petition for Rehearing was denied by an Order entered on June 2, 1967.

cc: Hon. Robert E. Schillberg
Mr. Henry Templeman, Deputy
Cradwick, Chadwick & Mills

Bell, Ingram & Smith
Mr. Lewis A. Bell
Court Reporter

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 5th day of June, A.D. 1967.

WILLIAM M. LOWRY
Clerk of the Supreme Court, State of Washington.

APPENDIX B

TREATY OF POINT ELLIOTT

Treaty of Point Elliott, 12 Stat. 927; (1859).

That said treaty provided, among other things, in Article III thereof as follows, to-wit:

> There is also reserved from out the lands hereby ceded the amount of thirty-six (36) sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of the Snohomish River, including Tulalip Bay and beforementioned Quil Ceda Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said territory.

Said treaty further provided in Article VII thereof as follows, to-wit:

> The President may hereafter, when in his opinion the interests of the territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the Sixth Article of the treaty with the Omahas, so far as the same may be applicable.

Sixth Article of the Treaty of March 16, 1854, with the Omahas:

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one (21) years of age, one-eighth of a section; to each family of two, one-quarter sections; to each family of three and not exceeding five, one-half section; to each family of six and not exceeding ten, one section; and to each family of over ten in number, one-quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years;

25 USC

§ 403a. Lease of lands on Port Madison and Snohomish or Tulalip Indian Reservations in Washington

Notwithstanding any other provision of law, any Indian lands on the Port Madison and Snohomish or Tulalip Indian Reservations in the State of Washington, may be leased by the Indians with the approval of the Secretary of the Interior, and upon such terms and conditions as he may prescribe, for a term not exceeding twenty-five years: *Provided, however,* That such leases may provide for renewal for an additional term not ex-

ceeding twenty-five years, and the Secretary of the Interior is hereby authorized to prescribe such rules and regulations as may be necessary to carry out the provisions of this section. Oct 9, 1940, c. 781, 54 Stat. 1057.

25 USC

§ 403a—1. **Sale or partition by owners of interests in allotted lands in the Tulalip Reservation; termination of Federal title, trust, and restrictions**

Any owner of an interest in any tract of land in the Tulalip Reservation, Washington, in which any undivided interest is now or hereafter held in trust by the United States for an Indian, or is now or hereafter owned by an Indian subject to restrictions against alienation or taxation imposed by the United States, may commence in a State court of competent jurisdiction an action for the partition in kind or for the sale of such land in accordance with the laws of the State. For the purpose of any such action the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any partition or conveyance of the land pursuant to the proceedings shall divest the United States of title to the land, terminate the Federal trust, and terminate all restrictions against alienation or taxation of the land imposed by the United States. June 18, 1956, c. 400, § 1, 70 Stat. 290.

25 USC

§ 403a—2. **Sale of lands by Tulalip Board of Directors; termination of Federal trust and restrictions; disposition of proceeds**

Notwithstanding the provisions of the constitution and char-

ter of the Tulalip Tribes of the Tulalip Reservation, any lands that are held by the United States in trust for the Tulalip Tribes, or that are subject to a restriction against alienation or taxation imposed by the United States, or that are on and after June 18, 1956 acquired by the Tulalip Tribes, may be sold by the Tulalip Board of Directors, with the consent of the Secretary of the Interior, on such terms and conditions as the Tulalip Board of Directors may prescribe, and such sale shall terminate the Federal trust or restrictions against alienation or taxation of the land: *Provided,* That the proceeds from the sale of any tribal lands acquired otherwise than by purchase shall be deposited in the Treasury of the United States to the credit of the Tulalip Tribes and shall not be expended until otherwise specifically provided by Congress. June 18, 1956, c. 400, § 2, 70 Stat. 290.

28 USC

§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory

California.....All Indian country within the State
Minnesota.....All Indian country within the State, except the Red Lake Reservation
Nebraska.....All Indian country within the State
Oregon.....All Indian country within the State, except the Warm Springs Reservation
Wisconsin.....All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. Added Aug. 15, 1953, c. 505 § 4, 67 Stat. 589, amended Aug. 24, 1954, c. 910, § 2, 68 Stat. 795; Aug. 8, 1958, Pub. L. 85-61, § 2, 72 Stat. 545.

INDIANS—CRIMINAL OFFENSES AND CIVIL CAUSES—STATE JURISDICTION

See Legislative History, p. 2409

CHAPTER 505 — PUBLIC LAW 280

(H.R. 1063)

An Act to confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State

Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in sub-section (a) of this section."

Sec. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or here-

after adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act; *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

25 USC

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress. June 18, 1934, c. 576, § 17, 48 Stat. 988.

25 USC

§ 231. Enforcement of State laws affecting health and education; entry of State employees on Indian lands

The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against

Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application. Feb. 15, 1929, c.216, 45 Stat. 1185; Aug. 9, 1946, c. 930, 60 Stat. 962.

8 USC

§ 1401. Nationality & Naturalization — Nationals and citizens of United States at birth

(a) The following shall be nationals and citizens of the United States at birth:

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

CHAPTER 37.12 R.C.W.

INDIANS AND INDIAN LANDS—JURISDICTION

37.12.010 Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session); but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

25 USC

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The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress. June 18, 1934, c. 576, § 17, 48 Stat. 988.

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Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application. Feb. 15, 1929, c.216, 45 Stat. 1185; Aug. 9, 1946, c. 930, 60 Stat. 962.

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(a) The following shall be nationals and citizens of the United States at birth:

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

CHAPTER 37.12 R.C.W.

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37.12.010 Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

37.12.021 Resolution of request — Proclamation by governor, 1963 act. Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

37.12.030 Effective date for assumption of jurisdiction — Criminal causes. Upon March 13, 1963 the state of Washington

shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed by or against Indians in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.040 Civil causes. Upon March 13, 1963 the state of Washington shall assume jurisdiction over civil causes of action as set forth in RCW 37.12.010 between Indians or to which Indians are parties which arise in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over other civil causes of action and, except as otherwise provided in this chapter, those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.050 State's jurisdiction limited by federal law. The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

37.12.060 Chapter limited in application. Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or

shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof.

37.12.070 Tribal ordinances, customs, not inconsistent with law applicable in civil causes. Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.

CONSTITUTION OF WASHINGTON

Article XXVI — Compact with the United States

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:—

First. That perfect toleration of regilious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same

shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall beimposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: Provided, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the Territory of Washington and payment of the same are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

CONSTITUTION OF WASHINGTON

Article 1, Section 12. Special Privileges and Immunities Prohibited.

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal; privileges or im-

munities which upon the same terms shall not equally belong to all citizens, or corporations.

UNITED STATES CONSTITUTION

AMENDMENT XIV. Section 1. Citizenship rights not to be abridged by states.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section 2. Privileges and immunities; fugitives.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

TULALIP TRIBAL CHARTER

Article VI—Section 1(c)—Powers of the Board of Directors—to approve or veto any sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets.

Article VI—Section 1 (1)—Powers of the Board of Directors—To safeguard and promote the peace, safety, morals, and general welfare of THE TULALIP RESERVATION by regulating the conduct of trade and the use and disposition of property upon the Reservation, provided that any ordinance directly affecting nonmembers of THE TULALIP TRIBES shall be subject to review by the Secretary of the Interior.

Article VIII—Section 12—Purchase of Land by Tribes —Tribal funds may be used, with the consent of the Secretary of the Interior, to acquire land under the following conditions: (a) land within the TULALIP RESERVATION or adjacent to the boundaries thereof which is not now in Indian ownership, may be purchased by or for THE TULALIP TRIBES; (b) restricted land which is in heirship status at the time of the adoption and approval of this constitution may be purchased by or for the tribes, with the consent of all the adult heirs and the legal guardians of minor heirs, payment therefor to be made as may be agreed upon.

TULALIP TRIBES
ORDINANCE No. 29

BE IT ENACTED by the Board of Directors of the Tulalip Tribes of Washington pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 USCA et seq) as amended and authority vested in it by Article VI, Section (1) of the Constitution and By-Laws for the Tulalip Tribes that in order to preserve and protect the public health, safety and general welfare a sanitary land fill garbage and refuse operation may be conducted within the boundaries of the Tulalip Reservation of Washington on the following described Tribal lands, to-wit:

Government Lots 8, 9, 10, 11, 12, 13, Southeast ¼ of the Southwest ¼ Southwest ¼ of the Southeast ¼, Northeast ¼ of the Southeast ¼, of Section 32, Township 30 North, Range 5 E, W.M.; Government Lots 9 and 10 of Section 31, Township 30 North, Range 5 E., W.M.; Government Lots 1, 2 and 3 of Section 1, Township 29 North, Range 5 E., W.M.; all of the same composing allotments number 91 and 92 entitled respectively Jack Wheeler and Richard Lawrence according to the records of the Bureau

of Indian Affairs of the Department of the Interior of the United States of America, Snohomish County, Washington.

BE AND IT IS FURTHER ORDAINED that such sanitary land fill operations shall be created, operated, and maintained in conformance to and compliance with the following Specifications, to-wit:

EXHIBIT A
OPERATING SPECIFICATIONS
SANITARY LAND FILL

1. FENCES:

The operating area of the sanitary land fill shall be enclosed by fencing with "chicken wire" mesh fence in order to confine and properly confining the scatter of litter by wind.

2. DIKES:

The active operational site, or at the operator's option, any larger part or portion or the entire land fill site, shall be protected from inundation by tide or river waters by the construction of an earth dike with a top width of not less than eight (8) feet and a top elevation of at least one (1) foot above the highest flood water of record, such dike shall not be constructed closer to the shoreline of Ebey and Steamboat Slough as the same exist at low tide than three hundred (300) feet. Such dike shall be constructed in horizontal layers not exceeding two (2) feet in depth and each layer shall be compacted by bulldozer or other heavy earthmoving equipment or by rolling. Such dike must be continuous and constitute a full and complete perimeter totalling surrounding any area of land constituting the active operational site or other areas selected pursuant to operator's option. Such dike may have within it other dikes known as "cell"

dikes which shall encompass an area of not less than ten (10) acres and which "cell" dikes shall be constructed only in such manner as to enclose and protect fill material, garbage and rubbish dumped within their confines and to permanently confine the same but need not otherwise be constructed to the specifications of the perimeter and/or outer dikes as above set forth. In the event land access is provided at any time to the site the top surface of the outermost dikes shall be maintained in condition to be traveled by automobile for inspection purposes. The outer face of all outer dikes, or dikes on the perimeter which are above specified, shall be protected by the placement thereupon of heavy materials not subject to erosion such as concrete, rock, broken pavement, stone and other similar materials. Damage to all dikes by erosion shall be promptly repaired and areas subject to repeated erosion shall be protected by placement of brush mats or rock rip-rap or sheet piling.

3. PREPARATORY WORK:

Preparatory work shall include clearing of brush and trees within the area upon which the operation will be conducted, excavation of a suitable barge mooring slip and entrance channel in the manner and of the nature disclosed by further exhibit attached hereto and construction of a peripheral dike to protect against possible flooding by abnormal high tides or high river levels.

4. TRANSPORTATION:

Refuse shall be transported to the area by tug towed barges with covered loads and unloaded only in the prepared unloading stations at the barge slips in the manner and with the precautions and requirements shown by other exhibits attached hereto and drawings in connection therewith.

5. PLACEMENT OF MATERIAL:

Garbage, rubbish and refuse shall be placed in layers not exceeding twenty-four inches (24") in compacted depth. Compaction shall be accomplished by spreading and rolling with track type tractors or caterpillars equipped with appropriate blades or buckets and of a size not smaller than a Caterpillar D-8 with appropriate blades or buckets.

All cartons, boxes, crates and similar containers shall be completely crushed in such manner that no voids for rat or vermin harborage shall remain in the completed fill. Material may be placed by area, ramp or trench method at the operator's option, but the working face of the fill shall be kept as small as possible and limited to that actually required for efficient operation. The fill will be placed by "advancing cell" method in layers of a maximum depth of not more than eight (8) feet. An additional lift may be similarly placed over said layer after the passage of six months' time, but not before.

6. EARTH COVER:

The sanitary fill will be placed by "advancing cell" method, spread and well compacted by bulldozers, with each day's "cell" completely covered on top and over all edges and face by not less than six inches (6") of dirt and cover material and earth. The final layer constituting the top of the eight (8) foot thickness shall be covered by not less than one (1) foot of compacted earth, and this compacted earth must be placed thereupon within one (1) week after completion of the layer. In the event of a further lift after six (6) month period of time, said further lift shall be in all respects similarly treated as to placement of material and as to earth coverage.

7. COVER MATERIAL:

Cover material shall be taken from the premises or from

the adjacent river channels, or from both, but shall not contain more than fifty per cent (50%) clay, nor more than seventy-five per cent (75%) of coarse sand.

8. NUISANCE CONDITIONS:

In the event nuisance conditions develop, including but not limited to the breeding or harborage of anthropods or rodents, noxious odors, fires or fire hazards, the operator shall place additional cover material necessary to control such nuisance and, if necessary, shall install gas collection and burning equipment to control odors not otherwise controlled.

9. FIRE CONTROL:

The operator shall furnish and install pumps and water lines adequate to furnish two (2) one hundred and twenty-five (125) gallon per minute hose streams to the operating site and to any portion of the fill area which has been covered for a period of less than six (6) months. He shall also provide adequate fire fighting equipment at the site to promptly and effectively stop all fires, and no burning of refuse of any kind shall be permitted without prior written consent. Fires occurring in previously burned fills shall be immediately smothered with earth and any fill subsidence as a result of such fires shall be brought to grade immediately by the filling thereof with earth.

10. DRAINAGE:

The operator shall so arrange his operations as to drain all water away from the active fill area, pumping from sumps if necessary to accomplish this purpose. In the event the burial of garbage below the water table results in noxious odors, the Lessor reserves the right to prohibit further deposition of garbage below the existing water table as measured in holes ex-

cavated fifty (50) feet from any drained trench area.

11. SCAVENGING:

Scavenging will be permitted upon the fill area as long as said premises leased are not reached or served by road. Salvaging will be permitted at any time.

12. MAINTENANCE:

The operator shall maintain the entire site in a clean condition and shall pick up and dispose of all litter scattering from the operating area. The operator shall have a continuing program of careful clean up to be pursued in the interest of general aesthetics, odor control, rodent control, and such other related potential nuisances. The operator shall maintain all surfaces of fills in such condition as to prevent the ponding of surface water thereupon and at the same time to also protect the cover material and refuse from erosion. He shall so control his operations as to prevent the occurrence of any dust, smoke or odor conditions, and the surface of the fill shall be inspected by him and by the Iessor not less than weekly for cracks or subsidence and necessary corrections shall be made by scarifying and recompacting cover or by the placement and compaction of additional cover. Within six (6) months of completion of the fill the operator shall seed all completed slopes and surfaces with rye grass to produce a dense stand thereof to control dust and erosion.

13. FINAL ELEVATION:

The elevation of the top of the fully completed fill shall be not less than twenty-four (24) feet above mean low or low water, which is a heighth approximately one (1) foot above the top of the rails of the Great Northern Railway Company

tracks adjacent on the east side of the subject property. In the event that there is a subsidence of the fill below said elevation, the operator shall, before terminating the operation or before the term of the lease to which the specifications are attached, fill with earth the surface of the entire area to bring it up to grade and to cause it to be level at the time of relinquishment of possession of the premises.

14. ADDITIONAL GENERAL PRECAUTIONS:

All barges will be unloaded directly into the sanitary fill area and later into receiving hoppers of endless belt conveyors extending to more remote "cells" of the advancing sanitary fill. Prior to unloading of barges large tarpaulins shall be suspended between the barge and the shore to catch any possible spillage, and netting wire baffles shall also be erected at strategic locations to arrest the scattering of windblown papers. Astern of each barge and across the slip in which it has been moored in order to be unloaded shall be placed a boom of logs to keep any spilled materials from drifting out into the tidal waters of Ebey Slough, Steamboat Slough and Port Gardner Bay. In the event materials do drift out, then appropriate steps must be taken and shall be taken by the operator to stop such practices and such loss of materials.

15. RECORDS:

The operator shall prepare and submit weekly to the Lessor a drawing showing by dimensions from previously established reference lines the extent of the completed fill. Drawings shall be dated and shall indicate by legend the depth (single lift or double lift) of the fill or fills.

16. INSPECTION:

The operator shall at all times permit access to the site by

the Tulalip Tribes or any authorized representative thereof, and shall, when directed by The Tulalip Tribes, immediately make available a qualified person authorized to receive and carry out instructions from the Lessor and to accompany the Lessor's representative on inspections.

17. SPRINKLING:

During periods of dry weather the operator shall water sprinkle the active face of the lift or fill prior to its daily covering, as well as apply an approved disinfectant and deodorant at all times in sufficient quantities to control flies or insects.

18. METHOD OF DISPOSAL:

The face of the lift of the active disposal area shall be maintained with an incline of less than 15% at the end of each day and as material is placed it shall be thoroughly compacted. All lifts shall progress in length not less than five lineal feet per day. The sides of each lift shall be raked and have a smooth surface and kept free of litter, and before the earth covering is placed upon the lift all surfaces and slopes must be compressed by the bulldozer to a reasonably smooth, hard and compact surface with no soft, low or high points existing. All active lifts at the site shall be completely covered to a uniform thickness with earth at the end of each day's operation.

19. DRAINAGE:

The area enclosed within the outside perimeter dikes shall be kept dry by the insertion of necessary tide gates and drains, and no tidal or river water shall be allowed to enter therein and all surface water shall be forthwith and immediately drained therefrom.

LASTLY, IT IS HEREBY ORDAINED that any violations of the provisions of this ordinance shall constitute a public nuisance and an offense against the peace and dignity of the Tulalip Tribes punishable by injunction restraining further operation in violation hereof or imposing a fine of $100.00 for each separate violation hereof with each day such violation continues to bring a separate offense, or both.

ADOPTED in regular meeting this 7th day of July, 1964, with a quorum present by a vote of 6 for and 0 against.

Charles R. Sheldon, Chairman

ATTEST:

Martin Williams, Secretary

Snohomish County Zoning Resolution No. 7

Amend Section 8, Sub-heading B, by adding Paragraph 2 to read as follows:

Garbage dumps, sanitary landfills, or any landfill operation or method for disposal of garbage with Snohomish County and areas over which the county has jurisdiction shall be permitted only upon the issuance of a Conditional Use Permit by the Board of Adjustment. The term garbage shall refer to any refuse, rubbish, effluent, sewage, sludge, offal, dead animals, or waste products of any nature or description.

SUPPLEMENTAL TO CHAPTER 37.12, R.C.W.
THE 1957 ENACTMENT

37.12.010 LEGISLATIVE HISTORY

1. Enacted Laws 1957 ch. 240 § 1 p. 941, which read: "The State of Washington hereby obligates and binds itself to assume, as hereinafter provided, criminal and civil jurisdiction over Indians and Indian territory, reservation, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session)."

2. Amended by Laws 1963 ch. 36 § 1, amending the section to read as at present.

37.12.020 Resolution of request—Proclamation by governor. (Repealed.)

LEGISLATIVE HISTORY

1. Enacted Laws 1957 ch. 240 § 2 p. 941, which read: "Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the State of Washington to the extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservation, country, and lands of the Indian body involved in accordance with the provisions of this chapter: *Provided*, That with respect to the Colville, Spokane, or Yakima tribes or reservations, he shall not issue such proclamation unless the resolution of the tribal council has been ratified by a two-thirds majority of the adult enrolled members of the tribe voting in a referendum called for that purpose."

37.12.030 LEGISLATIVE HISTORY

1. Enacted Laws 1957 ch. 240 § 3 p. 942, which read: "Sixty days from the date of issuance of any proclamation of the

governor as provided by RCW 37.12.020, the state of Washington shall assume jurisdiction over offenses committed by or against Indians in the lands prescribed in the proclamation to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and the criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state."

2. Amended by Laws 1963 ch. 36 § 2, amending the section to read as at present.

37.12.040 LEGISLATIVE HISTORY

1. Enacted Laws 1957 ch. 240 §4 p. 942, which read: "Sixty days from the date of issuance of any proclamation of the governor as provided by RCW 37.12.020, the state of Washington shall assume jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the Indian lands prescribed in the proclamation to the same extent that this state has jurisdiction over other civil causes of action and those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such Indian lands as they have elsewhere within this state."

2. Amended by Laws 1963 ch. 36 § 4, amending the section to read as at present.

37.12.060 LEGISLATIVE HISTORY

1. Enacted Laws 1957 ch. 240 § 6 p. 942.

2. Amended by Laws 1963 ch. 36 § 6, adding (1) "and tidelands," after "water rights"; and (2) adding "Indian land grants," after "with respect to".

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IN THE

Supreme Court of the United States

October Term, 1967

No. 548

SNOHOMISH COUNTY, a municipal corporation,
Appellant,

v.

SEATTLE DISPOSAL COMPANY, and THE TULALIP TRIBES, a federal corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS

IN OPPOSITION

TO: THE HONORABLE CHIEF JUSTICE and ASSOCIATE JUSTICES of the UNITED STATES SUPREME COURT:

Respondents, SEATTLE DISPOSAL COMPANY and THE TULALIP TRIBES, a federal corporation, pray that the Writ of Certiorari prayed for by appellant (petitioner) be denied and show the court as follows:

REFERENCES TO THE RECORD

All references to the record from the Supreme Court for the State of Washington are as follows:

App. Pet. .....Appellant's Petition
R. ST. .....Statement of Facts

OPINIONS BELOW

Respondents accept appellant's statement.

JURISDICTION

Respondents accept appellant's statement of jurisdiction.

CONSTITUTIONS, TREATIES, REGULATIONS AND STATUTES INVOLVED

Respondents accept appellant's recital of statutes, but would add the following:

R.C.W. 36.70.010 which states:

> "The purpose and intent of this chapter is to provide the authority for, and the procedures to be followed in, guiding and regulating the physical development of a county or region through correlating both public and private projects and coordinating their execution with respect to all subject matters utilized in developing and servicing land, all to the end of assuring the highest standards of environment for living, and the operation of commerce, industry, agriculture and recreation, and assuring maximum economies and conserving the highest degree of public health, safety, morals and welfare."

25 U.S.C. Sec. 403b, which states:

"Notwithstanding any other provisions of law, with the consent in writing of the individual Indian, association of Indians, or Indian tribe concerned, any restricted Indian lands situated within the State of Washington may be leased for religious, educational, recreational, business or public purposes, including, but not limited to, airports, experimental station, stockyards, warehouses, and grain elevators, for periods not to exceed twenty-five years under such rules and regulations as the Secretary of the Interior may prescribe; *Provided*, That nothing in this section or section 403c of this title shall be deemed to authorize such leases for the exploitation of any natural resources."

25 U.S.C. Sec. 415 which states:

"Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Southern Ute Reservation, and the Navajo Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regu-

lations as may be prescribed by the Secretary of the Interior."

U.S. Const., Art. I, Sec. 8, Cl. 3, which states:

"The Congress shall have power to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes."

25 C.F.R. Sec. 131.9, which states, in part:

"(a) Tribes * * * may negotiate on forms approved by the Secretary or his duly authorized representative and subject to the approval of the Secretary or his authorized representative, leases or permits with respect to tribal lands, at not less than the appraised value. * * * (b) The constitutions, by-laws, charters, ordinances and resolutions, adopted by tribes organized pursuant to the Indian Reorganization Act of June 18, 1934 * * * shall govern where inconsistent with regulations in this part."

QUESTIONS PRESENTED

Respondents believe that the questions presented can be summarized as follows:

1. Are lands purchased by The Tulalip Tribes, a federal corporation, subject to restrictions against alienation imposed by the United States;

2. Can such lands be voluntarily placed in trust to the United States;

3. If such lands are subject to restrictions against alienation or are held in trust by the United States, is zoning action by a municipal corporation of the State of Washington:

a. "An encumbrance" within the prohibition of 28 U.S.C. Sec. 1360 and R.C.W. 37.12.060;

b. Inconsistent with any federal treaty, agreement or statute as provided by 28 U.S.C. Sec. 1360; and,

4. If a municipal corporation cannot control the Indian's use of their land, can it control such use indirectly by controlling its use by a lessee?

Appellant's question concerning a passive trust (App. Pet. 3, question 2) was never presented to the Washington Supreme Court and should not be considered in this matter.

ADDITIONAL STATEMENT OF THE CASE

Respondents accept appellant's statement of the case, but would add:

1. The lease between Seattle Disposal Co. and The Tulalip Tribes was pursuant to an ordinance passed by The Tribes, pursuant to Article VI, Sec. 1(k) of its charter, which gave the Board of Directors the power to safeguard and promote the peace, safety, morals and general welfare of the tribe (R. St. 21).

ARGUMENT

A. The Lands in Question Are "Lands Held in Trust By The United States" Or Are "Subject to a Restriction Against Alienation Imposed By the United States."

R.C.W. 37.12.060, based upon 28 U.S.C.A. Sec. 1360 (note), is the principal limitation upon Washington jurisdiction and states, in part, as follows:

> "Nothing • • • shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tide lands, be-

> longing to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon this State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein * * *."

For the above restrictions to apply, Indian lands must either be "held in trust by the United States" or be "subject to a restriction against alienation imposed by the United States."

Allotment 91 qualifies, as these lands were acquired by the United States in trust for The Tulalip Tribes (St. 20). Allotment 92 qualifies as these lands were taken in the name of The Tulalip Tribes, a federal corporation, and by virtue of federal law they are subject to a limitation on alienation. 25 U.S.C.A. Sec. 403a provides in part, as follows:

> "Notwithstanding any other provision of law, any Indian lands on the * * * Tulalip Indian Reservations in the State of Washington, may be leased by the Indians *with the approval of the Secretary of Interior* and upon such terms and conditions *as he may prescribe*, for a term not exceeding 25 years. . . ." (Emphasis added)

In addition, Sec. 403a-2 provides for the sale of Tulalip owned lands *"with the consent of the Secretary of the Interior*, on such terms and conditions as the Tulalip Board of Directors may prescribe." (Emphasis added)

Both statutes, which pertain specifically to Tulalip owned lands, provide that a lease or sale may be made

only with the consent of the Secretary of Interior, thus they are subject to a restriction against alienation.

B. The County Has No Jurisdiction to Require a Conditional Use Permit on Indian Lands

By virtue of R.C.W. 37.12.060, the State and its subdivision have no right to (a) "encumber" Indian restricted lands, or (b) regulate the use of such lands inconsistent with any federal treaty, agreement, statute or regulation. R.C.W. 37.12.070 provides that any Indian ordinance, not inconsistent with State law, is controlling.

1. The zoning ordinance if construed to be applicable, is an "encumbrance" against Indian land.

An encumbrance is any "burden upon land depreciative of its value . . ., which, though adverse to the interest of the land owner, does [not] conflict with his conveyance of the land in fee." *Hebb v. Severson*, 32 Wn. 2d 159, 201 P.2d 156 (1948).

Clearly, a restriction against the use of such land in any legitimate way is an "encumbrance" as the basic purpose of a zoning law is to limit the use of the property (*Hauser v. Arness*, 44 Wn.2d 358, 365, 267 P.2d 691 (1954)), thereby decreasing its use and its value even though it does not inhibit the owner from conveying the land in fee. So the Washington Supreme Court held in our case.

2. An attempt to impose the zoning ordinance upon Indian lands is an attempt to regulate such lands inconsistent with federal treaty, agreement, statute or regulation.

The effect of the county's action is to regulate the use

of Indian lands for legitimate purposes, which is in conflict with a number of federal laws.

Indian Tribes are given the following powers over their lands:

a. 25 U.S.C. Sec. 403b allows any restrictive Indian lands within the State of Washington to be leased for "religious, educational, recreational, business or public purposes," with the approval of the Secretary of the Interior;

b. 25 U.S.C. Sec. 403a authorizes leasing of Tulalip land, with the approval of the Secretary of Interior;

c. 25 U.S.C. Sec. 415 authorizes leasing of Indian land, with the approval of the Secretary of Interior, for public, religious, educational, recreational, residential, or business purposes; and,

d. 25 C.F.R. Sec. 131.9 provides, in part, as follows:

> "(a) Tribes • • • May negotiate on forms approved by the Secretary or his duly authorized representative and subject to the approval of the Secretary or his authorized representatives, leases or permits with respect to tribal lands, at not less than the appraised value. • • • *The* constitutions, by-laws, charters, *ordinances* and resolutions, *adopted by tribes* organized pursuant to the Indian Reorganization Act of June 18, 1934 • • • *shall govern where inconsistent with regulations in this part.*" (Emphasis added)

The Tulalip Tribe Ordinance No. 29 provides specifically that these lands could be used as a garbage fill. Therefore, in accordance with 25 C.F.R. Sec. 131.9(b) this ordinance would govern.

Respondent's contention is recognized not only by the

Washington Supreme Court but by the Department of Interior. 58 I.D. 52 (1942). The department held that land acquired by the United States in trust for Indians is, in effect, land of the United States, and zoning ordinances do not reach such lands. The decision is set out in full as Appendix "A" of respondent's brief in the Washington Supreme Court, which is a part of the record herein.

By federal statutes and regulations, the Indians, with the consent of the Secretary of Interior, are authorized to lease their lands for various purposes. If the county can say, the lands are not to be leased for a specific purpose, viz., garbage fill purposes, then the county is regulating the use of such land, contrary to federal law.

3. *The Tulalip Ordinance controls.*

On July 7, 1964, pursuant to the Tulalip charter, the Board of Directors of the tribe passed Ordinance No. 29, under its power to promote the tribes' health, safety and general welfare (R. St. following p. 23). This ordinance authorized a sanitary garbage land fill on allotments 91 and 92. In accordance with R.C.W. 37.12.070 (assuming the county has jurisdiction), such an ordinance is controlling unless it is inconsistent with any applicable civil law of Washington.

The applicable Washington civil law does not prohibit sanitary garbage fills, as such, but includes such matters only under the general terms of "public health, safety, morals and welfare." R.C.W. 36.70.010, *et seq.* Thus, Washington law does not make illegal the action set out in Ordinance No. 29. It is only the action of Snohomish County which appears to conflict with the Tulalip ordi-

nance. Even the Snohomish County ordinance does not *prohibit* sanitary land fills and is therefore not in conflict with the Indian ordinance.

Therefore, since the tribal ordinance is not inconsistent with any applicable law of Washington, it is to be given full force and effect in the determination of civil causes of action.

In addition, the ordinance controls because of 25 C.F.R. Sec. 131.9(b), *supra*. That regulation states that tribal ordinances will contol if contrary to other regulations.

C. The Rights of the Tulalip Tribes Apply as Well to a Non-Indian Disposal Company

U.S. Const. Art. I Sec. 8, Cl. 3 states, in part:

> "Congress shall have power . . . to regulate commerce . . . with the Indian Tribes."

This is precisely what our case involves. Snohomish County is attempting to control commerce with the Tulalip Tribe by attempting to zone their lands and to impose zoning ordinances on non-Indians who deal with the Tulalips. This constitutes an attempt by the county to "regulate commerce . . . with the Indian Tribes" which is reserved to the United States.

The most recent case dealing with this point is *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 14 L.Ed.2d 165 (1965), in which this court held that the State of Arizona could not impose its sales tax upon a trader with the Indians, insofar as such tax was imposed on gross sales to the Indians. The court held that this field is controlled by the United States, and the state's attempt to tax the trader was inconsistent with federal

statutes. By inference the court held that the Arizona tax statute was an additional "burden" on commerce with the Indians.

In a number of cases which deal with attempted state control over third parties who are covered by federal enactments or who are dealing with the United States, the U.S. Supreme Court has upheld the supremacy of federal law. See for example: *Sperry v. Florida*, 373 U.S. 379, 10 L.Ed.2d 428 (1963), which held the state could not control patent attorneys, licensed by the United States, as such state action was a restraint on federal power; and *U.S. v. County of Allegheny*, 322 U.S. 174, 88 L.Ed. 1209 (1944), where the state attempted to tax a government contractor on federal property being used by him, and the court held this to be an indirect control of and tax on the federal property.

Since the county is by law prohibited from imposing restraints on Indian lands or encumbering them, it cannot impose such restraints indirectly by stopping non-Indians from dealing with the tribes or by frustrating Indian commerce with non-Indians by restraining the non-Indian.

ARGUMENT IN ANSWER TO APPELLANT

A. Introduction

Most of respondent's argument in answer to appellant is covered under its previous argument; however, the following points are pertinent.

B. Whether Allotment No. 91 Is Held in Trust

Appellant contends that the trust imposed on Allotment No. 91 is passive and dry and is thus not a trust at all.

First, this point was not brought before the Washington Supreme Court.

Second, even if the trust were to fail, the lands are still lands owned by an Indian tribe and subject to a restraint against alienation imposed by the United States.

Third, appellant's case of *Bailess v. Paukune*, 344 U.S. 171, 97 L.Ed. 197, 73 S.Ct. 198 (1952), is inapplicable as the beneficiary of the trust, in that case, was a non-Indian, who was not subject to the trustee duties of the United States and "there remains only a ministerial act for the trustee to perform, namely, the issuance of a fee patent."

C. Question of Denial of Equal Protection

Appellant argues that holding Tribal Ordinance No. 29 pre-empts the county zoning ordinance is a denial of equal protection.

By the Constitution of the United States Indians are given a position different from other citizens, as Congress has the power "to regulate commerce . . . with the Indian Tribes." U.S. Const., Art. I, Sec. 8, Cl. 3. Such "denial of equal protection," if it can be denominated as such, is likewise inapplicable where the State of Washington has been given no jurisdiction over a class of persons, as stated by the Washington Supreme Court in its decision.

Finally, appellant says that the Indians are denied equal protection. If so, it is their own voluntary act which does so, as they themselves accepted the lease and passed the ordinance.

CONCLUSION

The decision of the Washington Supreme Court was correct and should be sustained. A proper analysis of the problem can be categorized as follows:

1. The lands in question are either held by the United States in trust for The Tulalip Tribe or are subject to limitations against alienation imposed by the United States. As such, the state may not impose encumbrances nor restraints upon such lands.

2. The zoning of those lands, if held to be applicable, constitutes an encumbrance as it reduces the utility and thereby the value. In addition, such zoning is a restraint upon the use contrary to the statutory right of the Indians to lease their lands for business or public purposes, inconsistent with federal law.

3. The Tulalip ordinance is controlling, as it does not conflict with state law, and, further, is pursuant to federal statutory authority.

4. The prohibition against the county encumbering and restraining the land applies as well to Seattle Disposal Co., otherwise, the county could do indirectly what it cannot do directly.

Based upon the aforesaid, the Petition for Writ of Certiorari should be denied, with costs to the respondents.

Respectfully submitted,

ORVILLE H. MILLS for
CHADWICK, CHADWICK & MILLS, and
ANDERSON & HUNTER
Attorneys for Respondents
Seattle Disposal Company

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 548

SNOHOMISH COUNTY, A MUNICIPAL CORPORATION,
PETITIONER

v.

SEATTLE DISPOSAL COMPANY AND THE TULALIP
TRIBES, A FEDERAL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's order of November 6, 1967, inviting the Solicitor General to express the views of the United States in this case.

The petitioner, Snohomish County, sought to enjoin the Seattle Disposal Company from conducting a garbage disposal operation on certain lands leased from the Tulalip Tribes, without first obtaining a conditional use permit from the County pursuant to its zoning ordinance (Pet. B25). The Tulalip Tribes, a federal corporation, intervened. The trial court dismissed the suit (Pet. A1–3) on the ground that the

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State of Washington and its governmental agencies have no jurisdiction over the use of the land in question and that the County's zoning ordinance, if applied to the subject lands, would constitute an encumbrance in violation of 28 U.S.C. 1360 (Pet. B4) and the corresponding State law, R.C.W. 37.12.060 (Pet. B13).[1] The Supreme Court of the State of Washington affirmed (Pet. A4–10).

Prior to 1953, States lacked jurisdiction over lands, such as those here involved, held by Indian tribes under restrictions against alienation.[2] In that year, however, by Public Law 280 (Pet. B5–9, now codified as 18 U.S.C. 1162 and 28 U.S.C. 1360), Congress consented to State assumption of general civil and criminal jurisdiction, subject to stated limitations. The State of Washington accepted the invitation in 1963 (Chapter 37.12 R.C.W., Pet. B11–14) and State laws now generally apply within the Tulalip Indian Reser-

[1] Because the opinion of the Washington Supreme Court cites, interchangeably, the identically-worded federal and State statutes and invokes both federal and State decisions, a question arises whether its judgment rests on an independent State law ground. Cf. *Jankovich* v. *Toll Road Comm'n*, 379 U.S. 487. In our view, however, the court below construed the State law—if at all—merely as an exact reflection of Public Law 280, which is the earlier and controlling provision. Accordingly, we believe this Court has jurisdiction to review the case. *Id.* at 492.

[2] The substance of the federal restrictions is the same, whether in the form of a trust or a fee subject to restrictions. *Minnesota* v. *United States*, 305 U.S. 382, 388. Petitioner has raised a question whether the two parcels here involved are so restricted. We believe the Supreme Court of Washington has correctly and adequately disposed of this contention (see Pet. A7). At all events, relating as it does simply to these two particular tracts, that issue does not warrant review by this Court.

vation.[2] But, under both the federal statute and its State counterpart, local authorities may not "encumber" restricted Indian lands or "regulate [their] use * * * in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." 28 U.S.C. 1360(b) (Pet. B5); R.C.W. 37.12.060 (Pet. B13). The question here is whether the Snohomish County ordinance conditioning garbage disposal operations, if applied to the Indian lands in suit, would constitute an impermissible "encumbrance" or a "use regulation" inconsistent with federal law.

We believe the court below correctly answered in the affirmative. As the State court suggested, the local zoning restriction may well be inapplicable as an "encumbrance" on Indian lands. But, at all events, the ordinance plainly constitutes a "regulation of the use" of property inconsistent with pertinent federal regulations. The general provisions of federal law cited by respondent to one side (Br. in Opp. 8), the dispositive federal regulation (not cited in the papers filed here) is 25 C.F.R. 1.4:

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or

[2] Jurisdiction over Indian country in the State of Washington was not automatically ceded by Public Law 280; the State assumed jurisdiction over the Tulalip Reservation pursuant to the consent given by Section 7 of the Act (Pet. B9) on the request of the Tribe, as prescribed by its own law (R.C.W. 37.12.021, Pet. B12).

> controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.
>
> (b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

Since the Secretary of the Interior has not adopted the county zoning ordinance invoked here, it cannot—consistently with the quoted regulation—be applied to the lands in suit, under lease to the Seattle Disposal Company.

We note that this result is fully consistent with Public Law 280, the central purpose of which was to cede to the States general jurisdiction over *persons*

living on Indian reservations without, however, permitting local authorities to tax, encumber or otherwise diminish the value of restricted Indian lands. See H. Rep. No. 848, 83d Cong., 1st Sess., p. 5. As the regulation just quoted makes clear, the Department of the Interior has retained power to borrow appropriate restrictions on land use from State law when that is called for. At all events, the ruling here does not prejudice the question whether local authorities have power to abate an actual nuisance on reservation lands. The lease granted by the Tribes contains detailed protective conditions (Pet. B18–25) and there is no allegation that the operations of the Disposal Company constitute a hazard or inconvenience to non-Indian property in the county.

Believing that the decision of the Washington Supreme Court is plainly correct and that the question presented is of limited practical importance, we suggest that review in this Court is not warranted.

Respectfully submitted.

ERWIN N. GRISWALD,
Solicitor General.

DECEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

No. 548

IN THE

Supreme Court of the United States

October Term 1967

SNOHOMISH COUNTY, A Municipal Corporation,
Petitioner

v.

SEATTLE DISPOSAL COMPANY and the TULALIP TRIBES, A Federal Corporation

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

JOHN F. WILSON
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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

The County of Snohomish, in the State of Washington, the petitioner herein, prays that a rehearing be held on the denial of a writ of certiorari, Mr. Justice Douglas, with whom Mr. Justice White con-

curs, dissenting, decided December 18, 1967, Cause No. 548,

STATEMENT

On November 6, 1967, an order was entered in this case as follows: "The Solicitor General is invited to file briefs in this case expressing the views of the United States." In December of 1967 the Honorable Solicitor General did file a *Memorondum For the United States* in the cause. A *Memorandum in Reply to the Memorandum For the United States* was prepared and submitted to the court, but was not received by the Clerk of the United States Supreme Court until December 18, 1967, the same day as the Order denying the petition for a writ of certiorari was entered.

REASONS FOR GRANTING THIS PETITION FOR REHEARING

The Solicitor General states on page 5 of his memorandum that the question presented is of limited practical importance and that there is no allegation that the operations of the Disposal Company constitutes hazard or inconveniece to non-Indian property in the county. In reply, reference is made to a portion of Snohomish County's Petition for Rehearing submitted to the Supreme Court of the State of Washington in this case, as is set forth in Exhibit "A" herein. The cited portion of the Petition does not reflect that the size of the reservation is well in excess of thirty (30) square miles or that the Atlantic

Richfield Corporation has since proposed to develop an oil refinery immediately adjacent and north of the reservation, with an initial investment of 65 to 85 million dollars and which only makes the immediate development of long range plans for this area more critical. The Boeing site referred to in Exhibit "A" is the assembly plant for the 747 and the probable assembly plant for the proposed SST. It is for these reasons that Snohomish County feels there is great practical importance to this case.

The issue of 25 CFR § 1.4 was responded to in the Memorandum in Reply to the Memorandum for the United States, which is set forth in Exhibit "B" attached hereto, with printing errors corrected.

In addition to the arguments set forth in the dissent of Justice Douglas to the denial of the petition for a writ of certiorari in this case, this case presents fundamentally one issue. Who has the responsibility and power to zone Indian lands?

The policy of Congress is clearly one to transfer jurisdiction to the state.[1] The holding by the state

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[1] "Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general appli-

court in this case prevents the acceptance of jurisdiction in zoning by the State of Washington even if the Secretary of Interior should make applicable to the lands in question the ordinances and laws regarding zoning in Snohomish County, pursuant to 25 CFR § 1.4(b). The only remaining alternative if relief is not granted in this case is that the Secretary of Interior may adopt the local ordinances and laws in regard to zoning on this reservation, pursuant to 25 CFR § 1.4(b). This is a chimera. The county and state have no jurisdiction to operate such federal zoning programs. Zoning is a dynamic blend of legislative, judicial, quasi-legislative and quasi-judicial activities implemented by a competent, professionally trained staff requiring constant adjustments to all portions of the program. Assuming the required staff, boards, and commissions are provided by the Federal Government so as to allow adoption of local laws, there would be a myriad of problems involving jurisdiction over each parcel of property, coordination, revision of the laws, federal regulations, and ordinances resulting in a confused jurisdictional checkerboard on

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cation to private persons or private property, is deemed desirable.

"After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; . . ." H. Rep. No. 848, 83rd Cong., 1st Sess., p. 6. See also *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966).

the reservation that would in all probability prevent any effective operation.

Believing that in the long run zoning of the lands in question will be beneficial to the Indians involved and that eventually someone will have to squarely face this issue as industrial and urban growth reaches other reservations, we earnestly pray that favorable reconsideration be given to the requested petition for certiorari in this case. Snohomish County sincerely fears that failure to grant this petition will result in a failure of any level of government accepting responsibility for this problem.

Respectfully submitted,

JOHN F. WILSON
Special Deputy Prosecuting Attorney and Counsel for Petitioner

EXHIBIT "A"

I.

THE STAKES INVOLVED

The court should take judicial notice of the following information: The Boeing Company has launched one of the largest industrial projects ever in Snohomish County. The county is one of the fastest, if not the fastest, growing county in the United States. The population may well double (or more) in the next ten or fifteen years. 200,000 to 300,000 new residents

may well reside in Snohomish County in the next ten to fifteen years. The Tulalip Reservation lying just across the river to the north of Everett, bounded on the east by Marysville, on the west by the Puget Sound, and on the north by a relatively undeveloped area, is an extremely valuable piece of real estate, and will participate in this growth and development. Large suburban and urban developments are now knocking on the reservation's south and east doors. The freeway, which will run along the east side of the reservation, is scheduled for completion at the end of 1969, thus giving ten to fifteen minute access to the Boeing site, and thirty to forty minute access to downtown Seattle. At the present time much of the reservation is undeveloped, but this is already starting to change. Once the area is developed, due to the rules regarding existing non-conforming uses, no effective zoning or control of the development of the area is possible until the existing development has outlived its economic life. In other words, if any planning or zoning is to be effective before the year 2025 or 2050, it must be done within the next one, two, three, four or five years, at the very latest.

During oral argument, the respondent stated that the only federal control of land use on the reservation is in regard to sale of land and long term leasing, none other. In effect, there is no federal attempt, even, in regard to the long range planning or zoning or land use of the area. Although Tulalip Tribes, Inc. is a very progressive organization, it only controls a portion of the reservation. It has not made effective

zoning plans, and even if it has, it is impossible to make effective zoning if you only control the black squares of the checkerboard. Spot zoning is in effect no zoning. The county's control of the other squares also can have no real effect.

The states being denied any power in regard to zoning has in reality effectively prevented any long range planning or zoning control of this large and choice piece of property for the next century. This holding will have a direct and substantial effect upon the grandchildren of unborn residents of Snohomish County.

The county submits that with minor revisions in the holding of the court in the instant case, this result can be ameliorated, and at the same time, substantial safeguards can be provided to assure that the tribe, the individual Indians, and the interests of the United States in the property are protected.

In regard to the tracts directly involved in this case, the court can take judicial notice that suitable sites for sanitary land fill are very difficult to find, and if suitable, no zoning agency is likely to deny their use. If properly regulated, the sanitary land fill can be done in such fashion that no air, water, rodent, or aesthetics pollution takes place during operation, and upon completion, the land is far more valuable than it was at the start. This results in land which may be used for commercial, residential, or recreational use. Unregulated garbage dumps result in

each of these types of pollution, and the end result is unusable land. The tracts involved lie athwart the junction of Everett, Marysville, and the prime reservation lands. They lie in the island delta of the Snohomish River, in full view of Highway 99, the projected Interstate 5, and the international railroad mainlines. Reliance upon a nuisance theory of control guarantees that prior to control the river has been polluted, the air blackened, the diseases have spread, or the fires are raging.

Snohomish County contends that these are the stakes involved in this case.

EXHIBIT "B"

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1967

No. 548
SNOHOMISH COUNTY, A Municipal Corporation,
Petitioner

v.

SEATTLE DISPOSAL COMPANY and the
TULALIP TRIBES, A Federal Corporation

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

MEMORANDUM IN REPLY TO THE
MEMORANDUM FOR THE UNITED STATES

All parties and the Washington Supreme Court have missed the controlling citation as set forth by the Solicitor General in his Memorandum For the United States, pages 3 and 4, 25 C.F.R. 1.4.

No excuse can be given for the oversight, but it should be noted that the regulation as adopted must have been in light of the instant case before the Court, in light of the last paragraph of the introductory comment of John Carver, Jr., Under Secretary of the Interior, as set forth in 30 Federal Register, page 7520, which states:

> "Accordingly the new § 1.4 is hereby adopted as revised and is set forth below. Because there are immediate cases of conflict between the attempts of State and local governments to enforce zoning ordinances, building codes and similarly regulatory laws on the one hand and the provisions of leases and other agreements under which trust or restricted Indian property is being used on the other, it has been determined to be in the best interests of the Indians and the public to resolve those conflicts as quickly as possible. Therefore, the new section shall become effective on the date of this publication in the Federal Register."

No actual notice was given to the interested parties, although at that time there had been a judgment by the trial court (p. 1-3 of Petition for Writ of Certiorari) and the specific matter was pending before the Supreme Court of the State of Washington.

Section § 1360(b), as set forth on page B-8 of appellant's Petition for Writ of Certiorari and RCW-

37.12.060, as set forth on page B-13 of appellant's Petition for Writ of Certiorari, both state in the pertinent part:

> "*Nothing in this section shall authorize the* alienation, *encumbrance*, or taxation *of any real or personal property*, including water rights, *belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto;* or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

The result is that now in the state of Washington there is no method, even with the consent of the Secretary of Interior as set forth in 25 C.F.R. 1.4(b), for the state or any local governmental unit to exercise any zoning powers due to the holding of the Supreme Court of Washington that they are an encumbrance and therefore barred by both federal and state law.

This result will continue in spite of the aims set forth on page 3 of the H. Rep. No. 848, 83d Cong., 1st Sess., as follows:

> "This legislation, whether before the House or presently under committed consideration, has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection

of Indians to Federal laws applicable to Indians as such."

and in spite of the purpose of 25 C.F.R. 1.4, as set forth by the Under Secretary of the Interior in 30 Fed. Reg. 7520, as follows:

> "The purposes of this addition are: (1) to enunciate and particularize in regulatory form for the benefit and guidance of those concerned the sense of existing law under which laws, ordinances, codes, resolutions, rules or other regulations of a State, or its political subdivisions, limiting, zoning or otherwise governing, regulating or controlling the use or development of property are inapplicable to trust or restricted Indian property held or used under a lease or other agreement; and (2) to provide for the adoption and application by the Secretary in specific cases, after consultation with the Indian owner, of all or part of any laws enacted by a State or any of its political subdivisions regulating the use of property, which would otherwise be inapplicable."

Contrary to the assertion of the Honorable Solicitor General Erwin N. Griswold in the Memorandum For the United States, page 5, the holding in the instant case will prevent the Department of Interior from borrowing appropriate restrictions on land use from state law when it is called for, as in all cases in Washington, they will be a prohibited "encumbrance." Since this is the only highest state court ruling, this case will also be persuasive authority to be overcome in the other states which may have the same problem arise; namely, California, Minnesota, Nebraska, Oregon, Wisconsin, Arizona, Montana, New Mexico,

North Dakota, Oklahoma, South Dakota and Utah. See H. Rep. No. 848, 83rd Cong., 1st Sess., p. 6, 7. This case will have a bad precedential effect if not corrected.

The only logical remedy at this time to prevent this situation would be to summarily remand this case back to the Supreme Court of the state of Washington for reconsideration in light of the Memorandum For the United States and 25 C.F.R. 1.4. Assuming without conceding that the issue of whether there is a federal trust or whether the fee is subject to restrictions, is too narrow an issue to warrant review by this Court as set forth in note 2, page 2 of Memorandum For the United States, the controlling issue would be whether there is a retroactive effect to 25 C.F.R. 1.4, as it concededly is controlling if applicable.

Assuming the State of Washington finds 25 C.F.R. 1.4 is controlling and reverses its holding on encumbrance, then application could be made by Snohomish County to the Department of Interior to make the zoning codes at issue applicable to the Tulalip tribal lands and the hiatus which has developed in this case preventing either state or federal control of zoning in Washington would be prevented.

In regard to the statement of the Solicitor General that no allegation is made that the operations of the Seattle Disposal Company constitute a hazard or inconvenience to non-Indian property in the county, the reason is that procedurally, since the case was decided

by a motion for summary judgment proceeding, no opportunity has been presented for presentation of evidence thereon.

Although the issue has not been before any court, nor is it before this Court, the county's position in regard to Tribal Ordinance (Pet. for Writ of Cert., p. 17-25) and the lease to Seattle Disposal Company do not approach the federal government's recommended minimum standards for the operation of sanitary land fills.

Respectfully submitted,

JOHN F. WILSON
Special Deputy as
Counsel for Petitioner

December, 1967

CERTIFICATE PURSUANT TO RULE 58 § 2

I, John F. Wilson, Special Deputy Prosecutor and counsel for petitioner, hereby certifies that the attached petition for rehearing is presented in good faith and not for delay and that the petition is restricted to grounds which are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner, although not previously presented.

JOHN F. WILSON
Special Deputy Prosecutor
and Counsel for Petitioner

Due and timely service of the within brief by